IN THE MATTER OF SUCKLA FARMS, INC., AND CITY OF FORT LUPTON, COLORADO

UIC Appeal Nos. 92–7, 92–8

ORDER DENYING REVIEW

Decided June 7, 1993

Syllabus

Suckla Farms, Inc. ("Suckla") and the City of Fort Lupton, Colorado seek review of a June 16, 1992 decision granting Wright's Disposal, Inc. ("Wright's") a federal Underground Injection Control permit for the operation of a Class I injection well on a site that is owned by Suckla and leased by Wright's. Wright's has injected Class II wastes (specifically, oil and gas production wastes) into the well since August 1989 without any objection by Suckla, under a UIC permit issued by the State of Colorado. Suckla contends, however, that its lease agreement with Wright's does not allow Wright's to utilize the well for disposal of any wastes other than the oil and gas production wastes already being injected under the 1989 Colorado permit. Suckla states that it firmly opposes the injection of Class I wastes—in the case, principally wastes associated with the removal and cleanup of underground storage tanks—that is contemplated by the federal permit.

Suckla argues that EPA Region VIII should have denied the permit because: (1) Disposal under a Class I permit would constitute a breach of the lease, and the decision to issue the permit therefore compels Suckla either to enforce the lease in court or to suffer a trespass that carries with it a risk of future environmental liability; and (2) without Suckla's consent and cooperation, Wright's cannot inject Class I wastes in an environmentally protective manner that is consistent with the UIC regulations. Suckla also objects to the Region's alleged failure to impose construction, monitoring, and financial responsibility requirements consistent with the UIC regulations governing "hazardous" waste injection, arguing that it would be sensible to regulate the wastes specified in this permit as "hazardous" wastes even though they are not defined as such under the applicable regulations. Finally, Suckla objects to the Region's refusal to require the installation of a liner at a well site, for the containment of surface spills that could ultimately harm underground sources of drinking water in the area. The City of Fort Lupton adopts each of Suckla's objections to the proposed federal permit.

Held: The Region did not clearly err by deciding to issue a Class I permit notwithstanding the existence of a dispute over the permittee's contractual right to inject Class I wastes into this well. Having no authority to resolve such a dispute, the Region properly confined its inquiry within the limits of the role assigned to it by the Safe Drinking Water Act and the UIC regulations. The Region also correctly recognized that, as the regulations expressly state, the mere issuance of a UIC permit

does not authorize any invasion of private rights, such as the rights asserted by a landowner with respect to its real property. Nor did the Region err by declining to restrict the proposed Class I injection as if it were "hazardous" waste injection, in disregard of the contrary definition set forth in the regulations; Suckla cites no specific circumstances, other than its own dissatisfaction with the regulatory definition, that would have required such a departure from the terms of the applicable permitting standards. Similarly, Suckla offers no specific reasons, beyond its own preference for an arguably stricter permit, that would have compelled the Region to adopt the liner requirement requested by Suckla rather than the additional drinking water protection measures required by the Region. The petitions for review are therefore denied.

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge Firestone:

In this appeal, Suckla Farms, Inc. ("Suckla") and the City of Fort Lupton, Colorado challenge the EPA Regional Office's issuance of Permit No. CO1516–02115 to Wright's Disposal, Inc. ("Wright's") for the operation of a "Class I" injection well under the Underground Injection Control program established pursuant to Part C of the Safe Drinking Water Act, as amended, 42 U.S.C. §§ 300h through 300h–7. The well in question—designated the Suckla Farms No. 1 Injection Well—is currently operated by Wright's as a "Class II" well under a permit issued in August 1989 by the Colorado Oil and Gas Conservation Commission, which is the primary regulator of the UIC program in Colorado with respect to Class II, but not Class I, injection wells. The well site is owned by Suckla and is located in Weld County, Colorado, apparently in or near the City of Fort Lupton.[1] Wright's operates the well as a lessee pursuant to a lease agreement with Suckla dated as of May 16, 1989.

The appeal arises from a dispute between Suckla and Wright's, the prospective permittee, about the extent of Wright's authority under the terms of the May 1989 lease. In substance, the dispute concerns whether Wright's may inject Class I (as opposed to Class II) fluids into the Suckla Farms No. 1 Injection Well without violating the terms of its lease with Suckla. The Regional Office concluded that it lacked the authority to resolve this disagreement, and we believe that conclusion is unassailable. The Region also concluded that, whether or not Wright's may permissibly inject Class I fluids into the well as a matter of contract and property law, such injection would, if conducted in compliance with the proposed permit, not en-

[1] The documents in the administrative record state only that the well is located in Weld County.

danger any underground source of drinking water in the vicinity of the well or otherwise violate any regulatory requirement of the UIC program. Petitioners have not demonstrated that this conclusion is clearly erroneous, or that it otherwise merits further review. The petitions for review are therefore denied.

I. *BACKGROUND*

On June 9, 1989, Wright's filed a UIC permit application with the Colorado Oil and Gas Conservation Commission, proposing to drill and operate the Suckla Farms No. 1 Injection Well for the disposal of "produced water" generated in the course of oil and gas production activity in the Weld County area.[2] Before submitting this application, Wright's had entered into a June 8, 1989 letter agreement with Amoco Production Company, the owner of a majority interest in the mineral rights to the well site, as well as May 16, 1989 "General Lease" with Suckla, the owner of the surface rights and of the remaining interest in the mineral rights. Clause 2 of the Wright's-Suckla lease recites that

> Lessee intends to utilize [the leased] premises as a location for an injection well for the disposal of brine water and shall therefore drill a new well to an approximate depth of 9,500 feet for the purpose of injecting brine for disposal into the Lyons formation.

According to Suckla, this provision of the lease, by affirming the lessee's intention to inject "brine water" into the well, serves to limit the lessee's permissible uses of the well site to injection activities falling within the Class II UIC classification.[3] The Colorado regulatory authorities formally approved Wright's Class II permit applica-

[2] The permit application's reference to "produced water" is a shorthand expression for a particular variety of fluids that are classified, under the UIC program regulations, for injection into Class II wells. *See* 40 CFR § 144.6(b)(1) (defining Class II wells to include those that inject fluids "brought to the surface in connection with * * * conventional oil or natural gas production"). The application was directed to the State regulatory agency, rather than to the EPA Regional Office, because the State of Colorado has been granted primacy to administer the UIC program for Class II wells within its borders. *See* 40 CFR § 147.300 ("The UIC program for Class II wells in Colorado, except those wells on Indian lands, is the program administered by the Colorado Oil and Gas Commission approved by EPA pursuant to section 1425 of the SDWA.").

[3] Whatever the merits of Suckla's contention concerning the legal effect of this lease provision—a question on which we express no view—the Region apparently agrees (and we therefore accept as undisputed) that "brine water" is commonly understood to refer to certain Class II oil and gas exploration and production waste fluids.

tion on August 2, 1989, and injection of Class II fluids into the Suckla Farms No. 1 well commenced at or about that time.

Shortly thereafter, on September 27, 1989, Wright's filed a UIC permit application with EPA Region VIII, seeking a permit to operate the Suckla Farms No. 1 well as a Class I well[4] for the injection of "nonhazardous industrial fluids,"[5] in addition to the produced water from oil and gas fields already being injected under the State-issued Class II permit. In a November 27, 1989 supplement to its Class I application,[6] Wright's identified the Class I wastes proposed for injection into the well as follows:

> The source of our Class I water will be from recovered, non hazardous, contaminated surface water found in and around underground fuel storage tanks. This water is removed during the excavation and/or replacement of said tanks and associated piping. The only other Class I water anticipated at this time is that surface or ground water recovered from construction sites that contain dissolved, or particules

[4] EPA, rather than the State, administers the UIC program with respect to Class I wells in Colorado. *See* 40 CFR § 147.301 ("The UIC program for Class I * * * wells on all lands in Colorado, including Indian lands, * * * is administered by EPA.").

[5] The UIC regulations provide, at 40 CFR § 144.6, that Class I injection wells are of two types: (1) those that inject "hazardous waste," as defined in 40 CFR § 261.3; and (2) "Other municipal and industrial disposal wells which inject fluids beneath the lowermost formation containing, within one quarter mile of the well bore, an underground source of drinking water." Class I wells in the first of these categories—*i.e.*, Class I hazardous waste injection wells—are governed by stricter permitting criteria and standards than are Class I nonhazardous wells. *Compare* 40 CFR Part 146, Subpart B (technical standards applicable to Class I nonhazardous wells) *with* 40 CFR Part 146, Subpart G (technical standards applicable to Class I hazardous wells) and 40 CFR Part 144, Subpart F (financial responsibility requirements uniquely applicable to Class I hazardous wells).

The Class I permit at issue in this appeal is for a Class I nonhazardous well. *See* Revised Statement of Basis (June 16, 1992), at 1 ("This permit application is for a Class I well, which will * * * authorize the Suckla Farms #1 to dispose of nonhazardous fluids. These fluids will consist of reclaimed water associated with the removal of underground fuel storage tanks, pit water from oil field wash pits, contaminated surface water from construction sites, stored fuels, and other nonhazardous industrial waste fluids from [Adams, Arapahoe, Boulder, and Weld Counties], plus the Denver and Colorado Springs areas."); *see also* Final Class I Permit § II.C.6 ("The permittee is authorized to inject only Class II oil an[d] gas related fluids, Class I fluids from underground storage tank (UST) cleanup sites, and other nonhazardous industrial wastes as approved by the Director and listed in Appendix D. Injection of any hazardous waste as identified by EPA under 40 CFR 261.3 is prohibited.").

[6] This filing was captioned "Wright's Disposal, Inc. Underground Injection Control Permit, Supplemental Answers to Form 4."

> [sic] in solution, trace minerals such as limestone or high chloride and salts, and petroleum based products such as hydrocarbon fuels and oils.

In the same November 1989 submission, Wright's represented to the Region that Suckla, as the only owner of land within one-quarter mile of the injection site,[7] "was notified of Wright's intentions before the drilling of the injection well and a formal surface use agreement was entered into and is attached hereto and marked as Exhibit A." The "formal surface use agreement" attached as Exhibit A was a copy of the May 16, 1989 lease between Wright's and Suckla.

On August 14, 1991, Region VIII issued a draft Class I permit for nonhazardous industrial fluid injection, and solicited public comment on the draft permit. In an initial written comment dated August 26, 1991, Suckla at once called the Region's attention to Suckla's position that the "Suckla Farms, Inc. contract with * * * Wright's Disposal Inc. is for *Brine Water* only and Suckla Farms is opposed to the Injection of Industrial Waste and any other waste other than brine water." In subsequent written comments dated December 5 and December 20, 1991, Suckla reiterated its objection to any Class I injection activity as a breach of the lease, and also stated its concerns regarding the environmental soundness of the proposed permit. Various of these objections were also presented orally by Suckla's counsel at a public hearing held on December 5, 1991. The City of Fort Lupton, through a Member of its City Council, advanced its own objections to the proposed permit in the form of a City Council resolution read into the record of the December 5 public hearing.

The Region issued a Final Permit for Class I nonhazardous fluid injection on June 16, 1992, incorporating certain changes in response to the concerns expressed by commenters,[8] but rejecting Suckla's

[7] The UIC permitting regulations include, at 40 CFR § 144.31(e)(9), a requirement that "[f]or EPA-administered programs, the applicant shall identify and submit on a list with the permit application the names and addresses of all owners of record of land within one-quarter mile of the facility boundary." In addition, 40 CFR § 147.305 requires UIC permit applicants for wells in Colorado to "give separate notice of intent to apply for a permit to each owner or tenant of the land within one-quarter mile of the site."

[8] As discussed later, the Region included several additional requirements and limitations in Wright's permit, to which Suckla does not object. Specifically, the Final Permit (1) reduced the total combined volume of Class I and Class II fluids allowed to be injected from 27.7 million barrels to 8.3 million barrels; (2) added a supplemental monitoring requirement calling for the permittee to engage an independent firm, selected by EPA from a list to be compiled by the permittee, to perform a twice-

core argument that the terms of the Wright's-Suckla lease agreement precluded EPA's issuance of a Class I permit. In response to that objection, the Region disavowed any intention to offer an opinion concerning the legal effect of the disputed lease provision, much less to adjudicate the dispute. The Region explained, instead, that:

> [T]he EPA's issuance of this permit does not constitute a binding legal determination concerning the rights, privileges, duties, and liabilities of the parties [to] the lease. According to 40 CFR Section 144.51(g), the EPA's permit does not convey any property rights of any sort or any exclusive privilege. It is the responsibility of the operator to assure right of access to dispose [of] nonhazardous industrial waste. EPA believes that the issue of the right of access for the purpose of disposal is between the operator and the landowner.

Suckla and the City of Fort Lupton filed petitions for review of the Region's final permit decision pursuant to 40 CFR § 124.19.[9]

The petitions raise two basic claims of error. They first assert that the Region erred by disregarding the lease provision that, in petitioners' view, denies the permittee any "right of access" to the well site except for purposes related to the injection of Class II fluids. In addition, the Region is alleged to have unreasonably failed to impose certain technical permit conditions necessary to ensure that underground sources of drinking water will be adequately protected.[10]

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yearly environmental audit of the facility "for the purpose of evaluating the adequacy of facility operations and maintenance in preventing ground water pollution"; and (3) strengthened the permit's fluid analysis provisions so as to require repeated sampling of industrial wastes arriving regularly from the same source, in order to protect against the introduction of any hazardous constituents into the facility's on-site storage tanks and thence into the well.

[9] The City's "petition" is actually a two-paragraph letter signed by the City's Mayor, stating that "[t]he City of Fort Lupton adopts and incorporates by reference the Petition submitted by Suckla Farms Inc. in this matter, dated July 17, 1992." The remainder of our opinion will therefore make no separate reference to the City, but our discussion and disposition of Suckla's petition for review will apply to the City's petition as well.

[10] Citing EPA's omnibus authority under the UIC regulations to "impose on a case-by-case basis such additional conditions as are necessary to prevent the migration of fluids into underground sources of drinking water," 40 CFR § 144.52(a)(9), Suckla specifically asserts that the Region erred by: (1) failing to subject the proposed Class I operation to the technical criteria and standards applicable to Class I hazardous waste injection wells (40 CFR Part 146, Subpart G); (2) accepting an inadequate

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For the reasons that follow, we conclude that neither contention requires that we disturb the Region's decision.

II. *DISCUSSION*

Under the rules governing this proceeding, a UIC permit decision will ordinarily not be reviewed unless it is based on a clearly erroneous finding of fact or conclusion of law, or involves an important matter of policy or exercise of discretion that warrants review. *See* 40 CFR § 124.19; 45 Fed. Reg. 33,412 (1980). The preamble to section 124.19 states that this Board's power of review "should be only sparingly exercised," and that "most permit conditions should be finally determined at the Regional level * * * ." *Id.* The burden of demonstrating that review is warranted rests with the petitioner. *See Avery Lake Property Owners Ass'n,* UIC Appeal No. 92–1, at 3 (EAB, Sept. 15, 1992).

A. *Objections Rooted in the Wright's-Suckla Lease*

Suckla's principal argument on appeal is that the issuance of a Class I permit to Wright's represents an abuse of the Region's discretion because Wright's is not entitled, under its lease with Suckla, to undertake any activity related to the injection of Class I fluids. The argument has two components, one of which is admittedly unrelated to the environmental criteria governing the Region's permit decision, and the second of which is cast in terms of environmental risk but ultimately finds no basis in the applicable UIC regulations.

Suckla first argues that the issuance of a Class I permit places it at risk of incurring liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601 *et seq.,* at some future time, in the event that the well site becomes contaminated with industrial fluids, and that the Region's permit decision unfairly "forces Suckla to incur substantial legal fees" to enforce its rights as landowner against the permittee's threatened trespass.

Second, Suckla contends that because the permittee's "right of access" to the well site is strictly limited by contract, the permittee has no ability ("as a practical matter") to operate a Class I well in a manner that will ensure the protection of drinking water sources.

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surety bond as evidence of the permittee's financial responsibility; and (3) failing to require the permittee to install a liner for the containment of surface spills at the well site.

Specifically, the permittee allegedly (i) "has no legal access to comply with [the] permit conditions or [to] abate problems," and (ii) can neither protect the "area of review" against future inconsistent uses nor place a warning in the local property records for the benefit of future generations.[11]

In response to Suckla's first argument based on its ownership of the site—that the Region's Class I permit decision will force Suckla to spend money to enforce its lease, and may also subject Suckla to future CERCLA liability—Region VIII states that Suckla's contention erroneously assumes that a UIC permit "provides the Permittee a right of access that it would not otherwise have." The Region insists that the permit has no such effect. The Region relies on 40 CFR § 144.51(g), the language of which is included in the proposed Class I permit, and which states that the issuance of a UIC permit "does not convey property rights of any sort."[12] Accordingly, the Region concludes that the permit does not authorize Wright's to undertake any activity on Suckla's property that would violate the terms of the lease.

The Region further responds that Suckla's concerns about Wright's ability to adequately protect the environment under its permit, because of limitations derived from the lease, are unfounded. As the Region explains, if it should turn out that the permittee cannot access the property to inject Class I waste under its lease,

[11] Suckla's argument concerning "future inconsistent uses" appears in somewhat greater detail in its second set of supplemental comments on the draft permit, as follows:

> [There] is nothing to prevent future activities, including oil and gas exploration, from causing the injected fluid to migrate. Wright's Disposal does not own or control the property over the area to be influenced by the injection well (the area of review) and, thus, is in *no* position to protect the area of review from future inconsistent uses. Wright's Disposal cannot commit to providing institutional controls, such as a warning in property records for future generations, because the applicant has *no* control of the property. Under these circumstances, drinking water sources cannot be protected.

[12] Also relevant in this connection is 40 CFR § 144.35(c), which states that "[t]he issuance of a permit does not authorize any injury to persons or property or invasion of other private rights, or any infringement of State or local law or regulations." These limitations are expressly incorporated into section III.A of the Final Class I Permit, which provides in part:

> Issuance of this permit does not convey 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.

there is necessarily no environmental risk; and if it should turn out that the permittee is entitled under its lease to access the site for Class I injection, then the permittee must also ensure that it will have sufficient access to comply with the environmentally protective conditions of the proposed permit. The Region dismisses as "inconceivable" the notion that Wright's could obtain access (either consensually or as a result of litigation) for Class I injection but not for compliance with the protective conditions of the Class I permit. The Region also states that protection against "future inconsistent uses" is unnecessary because "the permit conditions are designed to prevent * * * contamination [of underground sources of drinking water], thus avoiding the need for future protection against inconsistent uses." Finally, the Region argues that a warning in the property records is not legally required under the UIC regulations, but suggests that the permittee could perhaps file such a warning irrespective of its ownership status.

We find ourselves in general agreement with the Region's conclusions, and for the reasons that follow we deny review of Suckla's objections based upon the lease between Suckla and Wright's. Fundamentally, we conclude that the Agency's UIC permit does not confer any property rights, and that therefore the Agency's role in evaluating a permit applicant's status as an owner or operator extends no further than is necessary to determine whether the applicant has complied with the relevant UIC permit application requirements. We believe this set of issues is controlled by *Columbia Gas Transmission Co.*, UIC Appeal No. 87–1 (Adm'r, April 13, 1987), in which the Administrator determined that "the Region was not required to take ownership of the land into account in issuing its final [UIC] permit decision," *Id.* at 3, despite the facility owner's opposition to the permit and the alleged lack of any agreement between the owner and the UIC permit applicant.

Under the UIC regulations, a permit applicant must identify itself on the permit application, under penalty of perjury, as being either the owner or operator of the facility. See EPA Form 7520–6 (UIC Permit Application); 40 CFR § 144.31(b).[13] An applicant must

[13] Section 144.31(b) provides that under the UIC program, "[w]hen a facility * * * is owned by one person but is operated by another person, it is the operator's duty to obtain a permit." The UIC regulation and application form thus do not require the signature of the facility owner, unlike their counterparts under EPA's RCRA hazardous waste management program. *See* 40 CFR § 270.10(b) ("When a [RCRA] facility * * * is owned by one person but is operated by another person, it is the operator's duty to obtain a permit, *except that the owner must also sign the permit application.*") (emphasis added). The Administrator has observed that this RCRA per-

also provide the Agency with "the names and addresses of all owners of record of land within one-quarter mile of the facility boundary." *Id.* § 144.31(e)(9). Once the Agency ascertains that the UIC permit applicant has satisfied these requirements, the Agency's concern with questions of ownership is generally at an end. Assuming that the applicant has not submitted false information to the Agency, but has truthfully claimed some entitlement to use the facility as an operator, the Agency need not inquire into the precise nature or limits of that entitlement. If, as in this case, the Agency should learn of a wholly private dispute concerning ownership or use of a well, unconnected with any provision of any applicable environmental law or regulation, the Agency has no authority to resolve that dispute in the context of evaluating a UIC permit application. *See Columbia Gas,* UIC Appeal No. 87–1, at 3 (endorsing the Region's contention that "'ownership of the land on which the facility is located or activity takes place is not * * * a consideration in issuing a permit to the operator'"). 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.[14]

Here, Wright's identified itself to the Regional Office as the operator of an existing Class II well, operating under a permit issued by the Colorado Oil and Gas Conservation Commission. Wright's submitted, with its Class I permit application, a plat indicating Suckla's ownership of the surface rights (and of a fractional interest in the mineral rights) to the well site. Wright's then supplemented this information with a copy of the lease agreement under which it was already operating the facility as a Class II injection well. In these circumstances, Wright's fulfilled its obligations under the above-cited regulations, and the Region properly concluded that any dispute between Wright's and Suckla concerning the terms of the lease was beyond the purview of the Region's role in the UIC permitting proc-

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mit application requirement flows from the Administrator's statutory obligation, under RCRA section 3005(a), 42 U.S.C. § 6925(a), to "promulgate regulations requiring each person owning or operating an existing facility or planning to construct a new facility for the treatment, storage, or disposal of hazardous waste * * * to have a permit issued pursuant to this section." *See Ford Motor Company,* RCRA Appeal No. 90–9, at 7 (Adm'r, Oct. 2, 1991). Whatever the wisdom of limiting this requirement to the RCRA context, the question whether the UIC program should include a similar dual signature requirement is beyond the proper scope of our review.

[14] Indeed, we would expect that Suckla might seek relief in an appropriate court, and we emphasize that nothing in this decision should be construed to limit in any way Wright's obligation to comply with any judicial order affecting its access to, or use of, Suckla's property.

ess. We therefore deny the petition for review insofar as it is based on the permittee's allegedly limited right to utilize the well site under the terms of its lease.[15]

Suckla's argument concerning the permittee's alleged lack of access to the site "to comply with permit conditions or abate problems" adds little to its central argument based on the terms of the lease. Assuming that Suckla successfully enforces its understanding of the lease in an appropriate judicial forum, injection of Class I wastes will simply not occur, irrespective of the Region's decision to issue a permit for such injection. If, on the other hand, the permittee secures Suckla's consent, or a judicial declaration, authorizing disposal of Class I wastes, the permittee is obligated to conduct such disposal in full compliance with all of the conditions of the permit and with all applicable requirements of the UIC regulations.[16] In other words, Wright's will either be allowed to operate a Class I well on Suckla's property—in which case Wright's must comply with the permit—or Wright's will not be able to inject Class I wastes. Neither scenario is incompatible with the UIC regulations, and Suckla's concern therefore provides no basis for review of the Region's permit decision.

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[15] We reject Suckla's assertion that, by issuing a permit for Class I injection, the Agency has somehow promoted or encouraged behavior detrimental to Suckla's legitimate interests. Neither Suckla's interest in minimizing its risk of future liability under CERCLA, nor its interest in preventing undesirable or unwanted uses of its private property, is in any way compromised by the mere issuance of a UIC permit. Rather, as 40 CFR § 144.35(c) expressly recognizes, EPA's UIC permitting process does not presume to rearrange private property rights or contractual relations, or to sanction conduct that is otherwise actionable between or among private parties. The proposed injection activity to which Suckla objects remains within its power to prevent, by filing a civil action in an appropriate forum, if the respective rights of Suckla and its lessee are as Suckla contends. The issuance of a Class I permit is in no way intended to alter or affect those rights.

Concerning Suckla's potential CERCLA liability, we also note that according to CERCLA section 107(j), 42 U.S.C. § 9607(j), CERCLA cannot be used to recover "response costs or damages resulting from a federally permitted release," and that the statute defines a "federally permitted release" to include "any injection of fluids authorized under Federal underground injection control programs * * *." *See* CERCLA section 101(10), 42 U.S.C. § 9601(10). Accordingly, Suckla's CERCLA liability may be limited.

[16] In this connection we note that, if necessary, Suckla can take action to abate any violations of the permit or regulations under the citizen suit provisions of the Safe Drinking Water Act. *See* SDWA section 1449(a), 42 U.S.C. § 300j-8(a) ("any person may commence a civil action on his own behalf * * * against any person * * * who is alleged to be in violation of any requirement prescribed by or under this subchapter").

Suckla's objection to the permit on the grounds that Wright's is unable to protect against "future inconsistent uses" (such as oil and gas exploration) of property in the vicinity of the well is also without basis. The UIC regulations for Class I nonhazardous injection wells simply do not require the permittee to implement the precautionary measures that Suckla advocates.[17] Rather, it appears that Suckla's objections are derived from the UIC regulation pertaining to post-closure care of Class I *hazardous* waste injection wells, 40 CFR § 146.72, which states in relevant part:

> (b) The owner or operator shall: * * * (4) Provide appropriate notification and information to such State and local authorities as have cognizance over drilling activities to enable such State and local authorities to impose appropriate conditions on subsequent drilling activities that may penetrate the well's confining or injection zone.
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> (c) Each owner of a Class I hazardous waste injection well, and the owner of the surface or subsurface property on or in which a Class I hazardous waste injection well is located, must record a notation on the deed to the facility property or on some other instrument which is normally examined during title search that will in perpetuity provide any potential purchaser of the property * * * information [concerning the wastes injected].

This particular well is a Class I *nonhazardous* well and the regulations governing it (40 CFR Part 146, Subpart B) do not impose any similar requirements; therefore, the Region did not clearly err

[17] This does not mean that the permit issuer is powerless to address a future inconsistent use that might pose a substantial threat to underground sources of drinking water. If, for example, the exercise of a lessor's and lessee's separate, but potentially conflicting, rights over the property would pose a substantial risk of jeopardizing the integrity of the confining zone separating the injection zone from drinking water sources, the permit issuer is authorized by EPA's omnibus authority in 40 CFR § 144.52(a)(9) to impose conditions "necessary to prevent the migration of fluids into underground sources of drinking water." This right exists independently of, and in addition to, the permit issuer's duty to impose specific conditions required by the regulations. In this case, however, given that the State is on notice of Wright's activity, we would expect that the State would exercise its permitting authority in a way that would take into account Wright's waste disposal well. *See infra* note 18.

by declining to impose them on its own initiative.[18] Moreover, we will not allow this permit appeal to be used as a vehicle for collaterally challenging the distinction drawn by the UIC program regulations between "hazardous" and "nonhazardous" injection wells. The time for any such challenge has long since past. *See* 42 U.S.C. § 300j-7 (petition for review of regulations implementing the Safe Drinking Water Act "shall be filed within the 45-day period beginning on the date of promulgation of the regulation * * * with respect to which review is sought, and may be filed after the expiration of such 45-day period if the petition is based solely on grounds arising after the expiration of such period."); *see also Ford Motor Company*, RCRA Appeal No. 90–9, at 8 n.2 (Adm'r, Oct. 2, 1991) ("Section 124.19, which governs this appeal, authorizes me to review contested permit conditions, but it is not intended to provide a forum for entertaining challenges to the validity of the applicable regulations.").

For all of these reasons, we decline to review the Region's permit decision for consistency with the terms of the May 16, 1989 lease between Wright's and Suckla, or for any other alleged defect arising from the permittee's limited "right of access" to the facility.

B. *Technical Objections*

The remaining objections set forth in Suckla's petition assert that the Region unreasonably failed to impose certain technical permit conditions that would, if adopted, provide additional protection for underground sources of drinking water. Suckla raises three specific objections of this nature, arguing that the Region erred by: (1) failing to apply the more stringent Class I hazardous well regulations (40 CFR Part 146, Subpart G) to this permit application, given that the wastes proposed to be injected would allegedly be classified as hazardous but for the exemption codified at 40 CFR § 261.4(b)(5)[19];

[18] Even if the hazardous well permitting standards were appropriate here, we note that the State of Colorado—having granted Wright's the original UIC permit for this facility—is already on notice that this well actively injects oil and gas production wastes (some of which are toxic) into a specified injection interval within the Lyons formation. In addition, the information specified in section 146.72(c) is available to any prospective purchaser of the well site through the EPA Regional Office (and presumably, at least in part, through Suckla itself). In these circumstances, the Region was not required to deny the permit based solely on the permittee's lack of ownership of the well site and the surrounding property, either under the specific permitting standards in the UIC regulations or under EPA's authority to impose, on a case-by-case basis, conditions "necessary to prevent migration of fluids into underground sources of drinking water" (*see* 40 CFR § 144.52(a)(9), discussed *infra*).

[19] Section 261.4(b) provides that "[t]he following solid wastes are not hazardous wastes: * * * (5) Drilling fluids, produced waters, and other wastes associated with

(2) failing to require the use of a liner to contain spillage at the surface, where the incoming wastes are unloaded from delivery trucks and placed in aboveground tanks before injection; and (3) failing to require a surety bond in an amount sufficient to remedy any "accidental sudden and non-sudden releases" of waste, or generally to impose financial responsibility requirements comparable to those that apply to RCRA hazardous waste facility operators. As authority for each of these contentions, Suckla cites 40 CFR § 144.52(a)(9), which states that in establishing UIC permit conditions tailored to a particular facility (as distinct from those that are universally required by regulation), the Regional Administrator "shall impose on a case-by-case basis such additional conditions as are necessary to prevent the migration of fluids into underground sources of drinking water."

Section 144.52(a)(9) plainly creates no general obligation for the Regional Offices to apply UIC hazardous waste injection well permitting standards to waste that is defined, under the UIC program regulations, as nonhazardous. That is so even if the waste in question is excluded from regulation as hazardous waste solely by virtue of a regulatory exemption, such as the RCRA program's exclusion (incorporated into the UIC program through 40 CFR § 144.3) of oil and gas production waste from the category of "hazardous waste." To hold otherwise would effectively nullify the UIC program's incorporation of the RCRA hazardous waste definition, as well as the program's intentionally disparate regulation of waste that is classified as "hazardous" under RCRA and waste that is not.

As we have already observed, this is not an appropriate forum in which to challenge the validity of the UIC regulations or the policy judgments underlying the structure of the UIC program. Yet Suckla offers no site-specific reasons to conclude that injection of

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the exploration, development, or production of crude oil, natural gas or geothermal energy." This exclusion applies to the UIC program by operation of 40 CFR § 144.3 (stating that, for purposes of the UIC program regulations, "*Hazardous waste* means a hazardous waste as defined in 40 CFR 261.3") and 40 CFR § 261.3(a) ("A solid waste * * * is a hazardous waste if: (1) It is not excluded from regulation as a hazardous waste under § 261.4(b); * * *.").

In its response to the petitions for review, Region VIII states for the first time that the section 261.4(b)(5) exclusion has no relevance to this permit because the exclusion applies only to Class II wastes. Although it does not expressly say so, the Region appears to be arguing that Suckla's concerns about hazardous waste are unfounded because the industrial fluids identified by Wright's for injection under its Class I permit do not contain any exempted hazardous wastes. The Region has not pointed to anything in the administrative record to support this assertion. Moreover, it is untimely and we will not consider it on appeal.

Class I fluids into this particular well poses a unique or distinctive threat to underground sources of drinking water—such that the presumptively applicable technical criteria should be supplemented with hazardous waste injection well criteria—or that Suckla's preference for adoption of the hazardous waste injection well criteria stems from anything more specific than an overall dissatisfaction with the applicable regulations.

In its Response to Comments, the Region observed that the oil field wastes already being injected by Wright's under the existing Class II permit, without any objection from Suckla, contain certain constituents (notably, benzene) that would cause those Class II wastes to be classified as "hazardous" but for the exemption in 40 CFR § 261.4(b)(5). The Region stated that it had nonetheless considered the merits of Suckla's proposal to subject any Class I injection activity to the technical criteria formulated for hazardous waste injection wells, and that it had evaluated the proposal against the standard established in 40 CFR § 144.52(a)(9). That evaluation led the Region to conclude that:

> [T]he construction of the well and the proposed monitoring program are considered adequate to protect USDWs from all injected wastes, including those exempted from RCRA; therefore, no additional construction or monitoring requirements are warranted to prevent the migration of injected fluids out of the injection zone.

The Region did, however, add certain other permit conditions that it believed would ensure adequate protection, including a sharply reduced total injection volume and an environmental audit requirement. *See supra* note 8. Suckla has not cited any specific construction or monitoring concerns in its petition for review that would lead us to question the Region's judgment to adopt those particular measures but not to impose additional or different requirements. Instead, Suckla essentially continues to rely on its objection that, as a general matter, the UIC program's adherence to the RCRA hazardous waste definition is ill-advised. That contention is inadequate to justify review. We have held that, in order to obtain review of a contested permit condition, a petitioner must demonstrate why the Region's response to a particular objection or set of objections is clearly erroneous or otherwise warrants review. *See LCP Chemicals—New York*, RCRA Appeal No. 92–25, at 4 (EAB, May 5, 1993). Here, Suckla has not met its burden. Accordingly, Suckla's request for review of this issue must be denied.

Virtually the same analysis compels us to reject Suckla's assertion that the Region erred by failing to require a more substantial surety bond or other demonstration of financial responsibility. For the reasons we have just described, Suckla cannot prevail on its claim of error merely by challenging the wisdom of the regulatory definition of "hazardous waste," or of the Agency's decision to apply more-detailed financial responsibility requirements to operators of hazardous waste injection wells than to operators of nonhazardous wells. Nor can Suckla's wholly conclusory invocation of section 144.52(a)(9)[20] overcome the Region's explanation, in response to Suckla's comments, that adequate protection against the results of accidental surface spillage can be provided through the Agency's emergency power to order corrective action under SDWA section 1431(a), 42 U.S.C. § 300i(a), to address any potential threat to "the health of persons."

In its challenge to the permit based on considerations of financial responsibility, Suckla also argues that a more substantial showing of financial responsibility is necessary in order to satisfy 40 CFR § 144.52(a)(7), which requires a well operator to provide evidence of its financial ability to "close, plug, and abandon the underground injection operation in a manner prescribed by the Director."[21] Suckla asserts that, as used in this regulation, the term "'closure' clearly must include cleanup of any escaped waste, including surface contamination." Suckla's argument is not supported by any relevant legal authority[22] and we do not, in any event, find its interpretation

[20] *See* Petition for Review, at 5–6 ("[U]nder 40 C.F.R. § 144.52(a)(9), EPA should require that the bond be sufficient to cover liability from accidental sudden and nonsudden releases. This is necessary to insure that accidental releases do not migrate to drinking water sources.").

[21] Actually, Suckla mistakenly relies on 40 CFR § 144.28(d) in support of its "closure" argument, but that regulation applies only to wells authorized by rule rather than by permit. The correct reference for Suckla's argument in the circumstances of this case is to section 144.52(a)(7), which requires the inclusion of the following condition in UIC permits for all hazardous waste injection wells, and for other wells "when applicable":

> The permittee is required to maintain financial responsibility and resources to close, plug, and abandon the underground injection operation in a manner prescribed by the Director. The permittee shall show evidence of such financial responsibility to the Director by the submission of a surety bond, or other adequate assurance, such as financial statements or other materials acceptable to the Director.

[22] Suckla cites the RCRA "Closure Performance Standard" regulation, 40 CFR § 264.111, in support of its argument, but does not explain how or why that RCRA regulation should affect our interpretation of the word "close" in the UIC regulations.

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of the financial responsibility rule persuasive. There are no "closure" requirements for Class I nonhazardous waste injection wells in the UIC regulations, but only "plugging and abandonment" criteria[23]; therefore, section 144.52(a)(7)'s reference to "closure" does not apply to Class I nonhazardous waste injection wells. Section 146.71 of the UIC regulations prescribes "closure" requirements for *hazardous* waste wells but includes no specific cleanup obligation of the kind that Suckla advocates, and it would therefore make little sense for us to find such an obligation implicit in the permitting standards for nonhazardous wells.[24] The financial responsibility requirements for Class I hazardous waste injection wells—presumably the most stringent rules of their kind in the UIC program—are themselves based only on the estimated cost of "plugging and abandonment," and demand no additional security against potential cleanup costs. *See* 40 CFR Part 144, Subpart F.[25] Based on all of these consider-

Similarly, when Suckla contends that Wright's should have been required to demonstrate financial responsibility by obtaining a bond "sufficient to cover liability from accidental sudden and non-sudden releases," it is urging, again without explanation, the imposition of a standard taken from the RCRA financial responsibility regulations at 40 CFR §§ 264.147(a) and (b). For reasons already discussed, a permit appeal is not the proper context in which to argue that the UIC regulations are deficient for failure to include more of the features of the RCRA hazardous waste program. Such an argument may be appropriate for presentation in a rulemaking context, but is out of place in this proceeding.

[23] The technical plugging and abandonment criteria for all Class I, II, and III wells are set forth in 40 CFR § 146.10. Sections 146.10, 144.52(a)(6), and 144.51(n) also refer to the submission of a "plugging and abandonment plan," and the permit before us incorporates such a plan as Appendix C. Suckla has not raised any objection concerning the adequacy of the permittee's plugging and abandonment plan, or concerning the permittee's financial ability to implement that plan.

[24] We note that the "corrective action" obligation established in RCRA section 3004(u), 42 U.S.C. §6924(u), applies to "[i]njection wells that dispose of *hazardous* waste." 40 CFR §270.1(c)(1)(i) (emphasis added). *See also* 40 CFR §270.60(b); *Bethlehem Steel Corp.*, UIC Appeal No. 85–8, at 6 (Adm'r, Jan. 19, 1989) ("Under the Agency's regulations, wells used to dispose of hazardous waste are subject to regulation under both the UIC and RCRA programs."). In contrast, nonhazardous injection wells are subject only to the narrower corrective action requirements set forth in 40 CFR §§ 144.55 and 146.7, which focus specifically on the need to ensure that other wells in the vicinity of a proposed well do not provide a conduit for migration of injected fluids. *See Bethlehem Steel*, UIC Appeal No. 85–8, at 18. In this case, the Region found that there were no nearby wells that penetrate the Lyons formation, and the permit issued to Wright's therefore includes no corrective action obligation.

[25] Although we have found no general requirement that potential cleanup costs be included in a UIC permit applicant's demonstration of financial responsibility, we recognize that in appropriate circumstances (which we need not attempt to identify here) a UIC permit issuer has the authority, under 40 CFR § 146.10(d), to require "aquifer cleanup and monitoring where he deems it necessary and feasible to insure adequate protection of USDWs."

ations, we decline to review the adequacy of the permittee's demonstration of financial responsibility.

Lastly, the Region did not clearly err by declining to require a liner for the containment of surface spills. In response to commenters' concerns regarding surface operations at the facility, the Region, as noted above, chose to require the operator to obtain an independent environmental audit "for the purpose of evaluating the adequacy of facility operations and maintenance in preventing ground water pollution." Suckla's only argument in favor of a liner is that the Region should have required one under 40 CFR § 144.52(a)(9), as "a necessary and reasonable step to protect the public," because the wastes proposed to be injected are chemically indistinguishable from "hazardous" wastes. We do not doubt that a liner requirement would provide an additional measure of protection, but Suckla offers no specific reason to believe that such a requirement is "necessary" to prevent the migration of fluids into underground sources of drinking water. Further, Suckla has not explained why the audit requirement chosen by the Region is any less reasonable an approach to the management of surface spills.[26] As noted above, a petitioner has the burden of demonstrating why the Region's response to its objections is clearly erroneous or otherwise warrants review. *See LCP Chemicals—New York,* RCRA Appeal No. 92–25, at 4 (EAB, May

[26] It appears from the record that the Region thoroughly considered the available options for addressing the possibility of surface spillage, and that it has not foreclosed any of those alternatives for dealing with the problem if it should arise. The Region offered the following assurances in its response to the comments pertaining to this issue:

> The primary concern relating to surface facilities was seepage into shallow ground water zones as a result of truck spills, leaking tanks, etc. Commenters were especially concerned that such seepage would contaminate their major drinking water source, the Laramie-Fox Hills aquifer. A review of data indicates that surface activities such as spillage could not affect the Laramie-Fox Hills aquifer because of its depth and hydrologic conditions. However, because surface spillage and leaks could impact shallower sands in the vicinity, EPA has modified the permit to require that the operator obtain an environmental audit using a third party contractor (designated by EPA) from a list furnished by the operator twice a year. The audit will look at the operation of the facility to determine if it poses a problem to shallow ground water sands and surface water. The results of the audit and EPA inspections will be utilized in determining if: (1) action under conditions of the permit is required; (2) a change in the permit is required; or (3) action under Section 1431 of the Safe Drinking Water Act (SDWA) is required.

5, 1993). Here, Suckla has failed to meet its burden. Review of this issue is therefore denied.

III. *CONCLUSION*

The petitions for review are denied in all respects.

So ordered.