

BEFORE THE ENVIRONMENTAL APPEALS BOARD  
U.S. ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.

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ORAL ARGUMENT

IN RE: :  
: UIC Appeal Nos.  
FLORENCE COPPER, INC. : 17-01  
: 17-03  
UIC Permit No. R9UIC-AZ3-FY11-1:

Thursday,  
July 27, 2017

Administrative Courtroom  
Room 1152  
EPA East Building  
1201 Constitution Avenue, NW  
Washington, DC

The above-entitled matter came on for  
hearing, pursuant to notice, at 1:00 p.m.

BEFORE:

THE HONORABLE AARON AVILA  
Environmental Appeals Judge  
THE HONORABLE MARY KAY LYNCH  
Environmental Appeals Judge

THE HONORABLE MARY BETH WARD  
Environmental Appeals Judge

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1 P-R-O-C-E-E-D-I-N-G-S  
 2 1:00 p.m.  
 3 MS. DURR: The Environmental Appeals  
 4 Board of the United States Environmental  
 5 Protection Agency is now in session for oral  
 6 argument In Re Florence Copper, Inc., permit  
 7 number R9UIC-AZ3-FY11-1, UIC appeal number 17-01  
 8 and 17-03.  
 9 The Honorable Judge is Mary Beth Ward,  
 10 Aaron Avila, and Mary Kay Lynch presiding.  
 11 Please turn off all cell phones and no  
 12 recording devices allowed. Please be seated.  
 13 JUDGE AVILA: Good afternoon to those  
 14 of you here in Washington, D.C. and good morning  
 15 to those participating by video conference in  
 16 Arizona.  
 17 Before we proceed any further I'd like  
 18 to confirm that those participating by video  
 19 conference in Arizona, are you able to see and  
 20 hear what's taking place here in D.C.?  
 21 MR. ANDERSON: Yes, sir.  
 22 JUDGE AVILA: All right, excellent.

1 That's great.  
 2 I'd also like to note that EPA Region  
 3 9 is observing the oral argument by video  
 4 conference.  
 5 The Environmental Appeals Board was  
 6 originally scheduled to hear oral argument today  
 7 in three petitions for review of the underground  
 8 injection control permit that EPA Region 9 issued  
 9 to Florence Copper, Inc.  
 10 Those petitions for review docketed as  
 11 UIC appeal numbers 17-01 to 17-03 were filed by  
 12 Mr. John Anderson, a member of the Gila River  
 13 Indian Community, and a third petition was  
 14 jointly filed by the town of Florence, Arizona,  
 15 and SWVP.  
 16 Earlier this week the Gila River  
 17 Indian Community filed a motion to dismiss its  
 18 appeal with prejudice because it had reached a  
 19 settlement with Florence Copper.  
 20 Yesterday the Board issued an order  
 21 granting that motion and removing the community's  
 22 petition from the oral argument calendar.

1 The Board issued another order  
 2 revising the framework for oral argument today.  
 3 So today's argument will proceed as outlined in  
 4 yesterday's order.  
 5 Specifically we will first hear  
 6 argument on Mr. Anderson's petition, and then  
 7 argument on the joint petition of the town of  
 8 Florence and SWVP.  
 9 On behalf of the Board I would like to  
 10 express that we very much appreciate the time and  
 11 effort each of you has expended in connection  
 12 with briefing on these petitions and preparing  
 13 for and participating in this oral argument.  
 14 Oral argument is an important  
 15 opportunity for you to explain your contentions  
 16 and the important issues in this case to the  
 17 Board.  
 18 It is also an opportunity for the  
 19 judges to explore with you the contours of your  
 20 arguments and the issues in this case.  
 21 You should assume that we have read  
 22 the briefs and other submissions and therefore

1 are likely to ask questions that will assist us  
 2 in our deliberations.  
 3 You should not assume the judges have  
 4 made up their minds about any of the issues in  
 5 this case, but instead we are using this as an  
 6 opportunity to listen, to help us understand your  
 7 position, and to probe the legal and record  
 8 support on which the region based its permit  
 9 decision.  
 10 There's no photography, filming, or  
 11 recording of any kind allowed. I'd like to note  
 12 the courtroom's technology was recently upgraded  
 13 and this is the first time we are holding an  
 14 argument with a remote participant using the new  
 15 technology. We expect things to go very  
 16 smoothly.  
 17 And finally, for the sake of clarity  
 18 and to avoid any confusion I wanted to note a few  
 19 abbreviations that may be used so that we have a  
 20 common understanding as to their meaning.  
 21 LBFU refers to the lower basin fill  
 22 unit. UBFU refers to the upper basin fill unit.

1 MFGU refers to the middle fine grain unit. AOR  
2 reviews to the area of review for the permit  
3 issued to Florence Copper. PTF refers to the  
4 Florence Copper production test facility.

5 And with that before we begin argument  
6 on the first petition I'd like all parties to  
7 introduce themselves and anyone who is  
8 accompanying them to the panel.

9 So let's start first with the  
10 petitioners, then EPA Region 9, and finally the  
11 permittee Florence Copper. And we'll start with  
12 Mr. Anderson.

13 MR. ANDERSON: I'm John Anderson. I  
14 live at 2631 North Presidential Drive here in  
15 Florence, Arizona.

16 JUDGE AVILA: Thank you.

17 MR. ANDERSON: Was that an echo?

18 JUDGE AVILA: Thank you very much.

19 MR. FRANCO: Good afternoon, Your  
20 Honor. My name is Jorge Franco. I'm here with  
21 my partner Ronnie Hawks on behalf of Southwest  
22 Value Partners petitioner.

1 MS. PASHKOWSKI: Good afternoon.  
2 Barbara Pashkowski on behalf of the Town of  
3 Florence.

4 MR. MINOR: Good afternoon. Dustin  
5 Minor on behalf of the EPA Region 9.

6 MS. ENGELMAN: Good afternoon. Alexa  
7 Engelman on behalf of EPA Region 9.

8 MR. TSIOLIS: Good afternoon. George  
9 Tsiolis with Florence Copper.

10 MS. MAGUIRE: Rita Maguire, co-counsel  
11 for Florence Copper.

12 JUDGE AVILA: Excellent. Thank you  
13 very much.

14 Okay, we'll proceed with argument in  
15 UIC appeal number 17-01. Mr. Anderson, you'll go  
16 first. I know you can't see the clock that has  
17 the timer on it.

18 First, do you want to reserve any time  
19 for rebuttal?

20 MR. ANDERSON: No.

21 JUDGE AVILA: Okay. I will do my best  
22 to let you know when there's five minutes left on

1 the clock so that you know when time is about to  
2 expire. But with that you can proceed.

3 MR. ANDERSON: Thank you. Thank you  
4 for allowing me to be a part of this hearing  
5 today.

6 I'd like to say that -- I'd like to  
7 begin by saying that water is the most precious  
8 resource in Arizona, not copper, not gold, but  
9 water.

10 Our state government recently set up  
11 a blue ribbon panel to address the future  
12 availability of water in our desert state.

13 Water is a matter of economic and  
14 individual survival for our state. Most states  
15 don't have to be concerned about water, but here  
16 in the Southwest we do. And I guess Region 9.

17 I have a unique role in this hearing  
18 today. I'm here because I live in the Anthem  
19 subdivision here in Florence. My home is less  
20 than two miles from the Florence Copper property.

21 The water to my home is pumped from  
22 the same aquifer called out in the Florence

1 Copper applications.

2 I know that my environment will be  
3 negatively impacted by an in situ mine. The  
4 water wells that provide water to my home and  
5 subdivision are approximately two miles from the  
6 Florence Copper site, 1.86 miles from the  
7 proposed production wells.

8 There are neighboring agriculture and  
9 home wells adjacent to the Florence Copper  
10 project. These wells are northwest of the  
11 proposed test wells and are in the direction of  
12 the aquifer flow.

13 JUDGE AVILA: On that point can I ask  
14 you one quick question?

15 MR. ANDERSON: Sure.

16 JUDGE AVILA: So is your argument that  
17 the permit doesn't have strong enough terms in it  
18 to address the concerns you're raising here to  
19 protect underground sources of drinking water?

20 Or is it your position that there's no  
21 permit that could have been issued at all?

22 MR. ANDERSON: Well, I'll get to that

1 but yes, my position is that the permit should  
 2 have never been issued.

3 JUDGE AVILA: And you don't think  
 4 there's any other provisions that could have been  
 5 added to the permit that would have made it  
 6 properly issued.

7 MR. ANDERSON: Well no, because the  
 8 UIC code which I will get to very clearly says  
 9 that an in situ well process cannot be in the  
 10 same aquifer that provides drinking water.

11 JUDGE LYNCH: Mr. Anderson, can I ask  
 12 you a question? Is there any drilling that would  
 13 not be objectionable in your view in this  
 14 particular location?

15 MR. ANDERSON: There is no drilling  
 16 that would not go into the aquifer.

17 JUDGE LYNCH: So your position is  
 18 there should not be any drilling at all in this  
 19 region.

20 MR. ANDERSON: That's correct.

21 JUDGE LYNCH: Thank you.

22 MR. ANDERSON: May I continue?

1 JUDGE LYNCH: Yes.

2 MR. ANDERSON: Okay. The water  
 3 provides water to my home and my subdivision. To  
 4 allow Florence Copper to pollute the aquifer is  
 5 very personal to me. The water from the aquifer  
 6 is the water that my wife, my family, my dogs  
 7 Foxie and Sadie my neighbors and I drink and  
 8 cook, and water our gardens and plants with.

9 The Florence Copper application shows  
 10 in situ wells ranging from 554 feet down to 777  
 11 feet.

12 The Johnson's utility wells that are  
 13 shown in the Florence Copper application are 400,  
 14 600, 800, and 1,000 feet. Maybe that answers  
 15 your question.

16 We share the same aquifer as Florence  
 17 Copper.

18 Now the question is how fast --

19 JUDGE WARD: Mr. Anderson, if I could  
 20 just ask a little bit of a follow-up question.

21 I think what we've seen the EPA  
 22 respond is to say that while there will be

1 injection in this oxide bedrock zone they don't  
 2 expect and they don't think it's likely for the  
 3 injected fluids to migrate into the lower basin  
 4 fill unit.

5 Which I think that's the part of the  
 6 underground area that serves as the drinking  
 7 water source for your wells. Is that right?

8 MR. ANDERSON: Well, our wells are at  
 9 all three aquifers. We have a well in all three  
 10 of the aquifer levels.

11 Now, if I look back which I will get  
 12 into here shortly, back in 1997 when BHP had  
 13 applied for the in situ process they were given  
 14 an aquifer exemption.

15 The EPA back in 1997 recognized that  
 16 this injection process was going to be in the  
 17 aquifer. And they allowed BHP to get a permit  
 18 based on an aquifer exemption.

19 Now Florence Copper hasn't applied for  
 20 an aquifer exemption but they're going into the  
 21 same aquifer that BHP did.

22 So my contention is that they are in

1 the same aquifer, they are going to contaminate  
 2 the aquifer, and the aquifer is close enough that  
 3 it should not be approved.

4 Because in 1997 there were no homes in  
 5 that area. Today there's about 3,000 homes in my  
 6 subdivision and probably 6,000 people within two  
 7 miles of this proposed in situ mine.

8 And we have four wells in our  
 9 neighborhood that supply our neighborhood.

10 JUDGE LYNCH: Mr. Anderson, what's  
 11 your response to the fact that on the face of the  
 12 1997 aquifer exemption it states that it has no  
 13 expiration?

14 MR. ANDERSON: It's my understanding  
 15 that Florence Copper tried to renew that and the  
 16 EAP turned them down.

17 JUDGE LYNCH: So what's your view on  
 18 whether the 1997 aquifer exemption is in effect?

19 MR. ANDERSON: Well, my view is that  
 20 it's not in effect because the code was clear  
 21 that it couldn't be close to homes that were  
 22 using the aquifer. And it never went into

1 production.

2 JUDGE WARD: Mr. Anderson, if I could

3 follow up on that a little bit. I think again

4 back to the record and the agency's analysis here

5 for this permit, I read the agency as having

6 concluded that given the operational parameters

7 in this permit and given the testing that will be

8 conducted they don't expect the injection fluids

9 to even escape the oxide bed zone which is at the

10 production test facility.

11 And that even under a worst case

12 scenario, that is the loss of hydraulic control

13 for 30 days, the injectants won't migrate more

14 than 54 feet into this lower basin fill unit.

15 In addition, at least as I'm reading

16 the region's response to the permit -- they point

17 out that the permit requires or would require

18 after closure of this test facility that the area

19 be cleaned up to meet drinking water standards.

20 And I think all of that leads them to

21 conclude that there really isn't a risk to the

22 wells in your neighborhood or elsewhere from this

1 permit.

2 What in your view is wrong with that

3 analysis?

4 MR. ANDERSON: Well, first of all,

5 there is no way to guarantee that they can

6 control that injections.

7 If you look at their application,

8 their application shows major faults in that

9 area. I think they show about five faults, major

10 and minor faults in their property.

11 Those faults is how the water moves

12 from one aquifer to another. They have contended

13 that this is a controlled aquifer. Well, it's

14 not. The water has to come from somewhere and it

15 usually goes somewhere.

16 The lower aquifers are fed from the

17 upper aquifers. You don't have to be a real

18 hydrologist to figure that out.

19 And so my contention is that they

20 cannot control it. The U.S. Geological Survey

21 has published different reports on the in situ

22 mines and even the Arizona Department of Geology

1 has done reports on the in situ mines here in

2 Arizona.

3 They all have contaminated the

4 aquifers and there's no an in situ mine anywhere

5 in the world that I could find where they have

6 returned the water -- the aquifer back to

7 drinking water standards.

8 JUDGE AVILA: Mr. Anderson, those five

9 faults that you must mentioned, are they within

10 the area of review for this particular permit?

11 MR. ANDERSON: Yes.

12 JUDGE AVILA: They're within the area

13 for review?

14 MR. ANDERSON: They're on the

15 application. That's where I got the information.

16 Would you like to have the names of them?

17 JUDGE AVILA: And on the restoration

18 you attached a U.S. Geological Survey study or

19 open file report to your petition.

20 As I read that it only addresses --

21 and I just want to make sure I'm reading the

22 document right.

1 It addresses uranium mining in Texas,

2 correct?

3 MR. ANDERSON: Yes.

4 JUDGE AVILA: It doesn't address coal

5 mining or any other location, right?

6 MR. ANDERSON: I think that's correct.

7 JUDGE AVILA: Okay.

8 MR. ANDERSON: But the process is the

9 same. They're using acid to extract uranium.

10 JUDGE LYNCH: I had a question about

11 the Arizona geological survey that you

12 referenced. Did you submit that with your

13 comments on the permit?

14 MR. ANDERSON: I don't know. I can

15 get that to you if you'd like. I have it in my

16 notes today.

17 JUDGE LYNCH: Okay, thank you.

18 MR. ANDERSON: Okay.

19 JUDGE WARD: Mr. Anderson, could I

20 follow up on the issue of restoration. I think

21 reading the response to comments that the region

22 sites to the BHP pilot test and that there have

1 been no exceedances in drinking water standards  
2 following the activity of that site based on  
3 quarterly monitoring for the past 20 years.

4 So I think the region is arguing that  
5 that demonstrates the restoration is possible, or  
6 at least you can clean up to drinking water  
7 standards. What's your response to that?

8 MR. ANDERSON: Well, those tests ran  
9 over a 90-day period and that was -- I think it  
10 was limited to one well.

11 They currently have I think it was  
12 1,817 wells on their site now and I just can't  
13 comprehend that testing on one site for 90 days  
14 is a comprehensive test to prove the aquifer.

15 Now, at the January meeting we had  
16 back in 2015 with the EPA I asked the EPA  
17 engineers from Region 9 about this.

18 They said that they had modeled the  
19 aquifer and the aquifer was very slow-moving and  
20 it would take it 20 years before the aquifer  
21 would reach the wells in my subdivision.

22 So they did admit and agreed that the

1 aquifer is moving. So I just can't see how we  
2 can say that the regional tests were proper.  
3 We've already challenged this and the town has  
4 challenged the position of the monitored wells  
5 because they weren't downflow of the test wells.

6 So there's a lot of reasons that I  
7 feel that this was not a valid test that was done  
8 back in 1999, whenever it was.

9 JUDGE AVILA: Mr. Anderson, you just  
10 mentioned the 20-year time period. I know you  
11 mentioned that in your petition as well. You  
12 said an EPA engineer had told you that it would  
13 take 20 years for migration to occur to the wells  
14 that you were concerned about.

15 Did that occur at the public hearing  
16 that was held in 2015?

17 MR. ANDERSON: Yes. It was January of  
18 2015, yes.

19 JUDGE AVILA: And so I didn't see  
20 anything along that line in the transcript. So  
21 is there anywhere in the record that that 20-year  
22 statement is reflected?

1 MR. ANDERSON: No, as a matter of fact  
2 I asked to get a copy of that and never got a  
3 response.

4 JUDGE AVILA: You asked for a copy of  
5 what?

6 MR. ANDERSON: Of the model. He said  
7 that they had modeled, as a matter of fact I  
8 mentioned that to Mrs. Rumwell at a later time  
9 and I would like to thank her for her  
10 participation and her response. She's been very  
11 nice to me over the years.

12 And I do appreciate the response I'm  
13 getting from the EPA. I just don't agree with  
14 the ruling that they issued.

15 JUDGE WARD: If I could follow up on  
16 that. What we see in the record before us is  
17 first in the statement of basis which was issued  
18 with the draft permit.

19 And then again I think it's repeated  
20 in the response to comments that the modeling  
21 shows it would take over 200 years to reach the  
22 active drinking water wells. And I'm assuming

1 those are the ones that are in your community.

2 In terms of the review by the Board we  
3 have to examine what's before us and what's in  
4 the written record to see if there's any clear  
5 error.

6 And so I'd like to give you an  
7 opportunity in looking at the analysis in the  
8 record and the conclusion or the finding that it  
9 would take 200 years is there anything that you  
10 can point out to us that's wrong in that  
11 analysis?

12 MR. ANDERSON: Well, I haven't seen  
13 that analysis. That's the reason I asked for the  
14 model, but I never got that back from the EPA.

15 JUDGE WARD: Mr. Anderson, if I could  
16 just follow up on one more point about the  
17 January 2015 hearing.

18 And we've heard your petition. I  
19 think you'd made the point in your petition that  
20 the agency didn't respond to concerns and  
21 comments that you had made at the 2015 hearing.

22 And I've read your comments that you

1 made at the hearing. If you could identify for  
2 us specifically what comments or concerns you  
3 don't think were addressed.

4 MR. ANDERSON: Well, I don't recall  
5 exactly what my comments were at this time, but  
6 in general my concern has always been about the  
7 aquifer flow and was the aquifer flowing, and  
8 were they in drilling and injecting into the same  
9 aquifer that supplies my home.

10 Because I was told and I have looked  
11 up on the EPA website and documents where it's  
12 fairly clear that they are not allowed to use the  
13 same aquifer that's used for drinking water.

14 And so to me it's just rather clear  
15 that we shouldn't even be considering this  
16 because they are using the same aquifer that  
17 supplies my drinking water.

18 Now if it takes 20 years, if it takes  
19 50 years, if it takes 100 years the law that I  
20 read said current use or future use.

21 It's rather frustrating that we have  
22 to go over this, and that was one of my points at

1 the hearing. And there was a lot of points that  
2 we tried to make at the hearing about the whole  
3 process that was going on.

4 But if I can continue some other stuff  
5 that I found out since the hearing was there is  
6 an EPA document 402-R-99-02 that was issued --  
7 this was back in October of 1999. This was  
8 relative to the BHP project.

9 And it says BHP Copper formerly Magnum  
10 was granted a UIC permit 396000001 and an aquifer  
11 exemption.

12 And it also states that it was located  
13 two miles northwest of Florence, Arizona.

14 Now, that is -- the application also  
15 talks about being northwest of Florence. This  
16 mine actually sets in the middle of Florence,  
17 Arizona. The town is 63 square miles and it's  
18 almost dynamically right in the middle of town.

19 So there is a misrepresentation of the  
20 location of this mine as well as the operation of  
21 the mine.

22 But this document that I was just

1 reading from goes on to say that the copper ore  
2 body is between 400 and 600 feet deep.

3 And it goes on to say that the water  
4 table is 130 feet below the surface and the ore  
5 body is within the saturated zone.

6 So if there hasn't been any major  
7 geological changes since 1999 so I really  
8 question the Florence Copper saying that they're  
9 not in the saturated zone when in 1999 the EPA  
10 said that they were.

11 JUDGE AVILA: Mr. Anderson, I don't  
12 mean to interrupt you but I just wanted to let  
13 you know you have five minutes left.

14 MR. ANDERSON: Okay. I just want to  
15 clarify that EPA's UIC code says that an aquifer  
16 is an underground body of rock that contains and  
17 transmits groundwater.

18 The UIC regulations allow the EPA to  
19 exempt aquifers that do not currently serve as a  
20 source of drinking water and will not serve as a  
21 source of drinking water in the future.

22 Now, that being said that right there

1 is enough to disqualify this from being approved.

2 The SECO technical reports talks about  
3 the faults, it shows the faults, the Ironwood  
4 faults, the Sidewinder, the Rattlesnake fault,  
5 the Thrasher fault, the Gico fault, the Paddy  
6 Line fault.

7 And as I said this is how water is  
8 shared between the aquifers. There's just  
9 different agencies like the U.S. Geological  
10 Survey has numerous studies about the adverse on  
11 the environment.

12 As you found out most of their data is  
13 about uranium and coal mining, but the words may  
14 differ but the process is exactly the same.  
15 They're using acid to extract and contaminate.

16 The one last thing that I would like  
17 to say is that on this permit it talks about the  
18 leech heap operations being nearby.

19 There are no leeching processes  
20 defined in the leech property where they're  
21 wanting to put these wells. The town of Florence  
22 has turned down their application to change the

1 zoning on their property.

2           So they don't have the facility to do  
3 the leeching on. They don't have the facility  
4 for the storage. They don't have the facility to  
5 handle the waste.

6           So they're not prepared to do this on  
7 the small piece of land that they have.

8           Going back to some of the other  
9 documents that previously Conico abandoned this.  
10 BHP has abandoned it for various reasons.

11           Your own model says the mine will  
12 pollute. Now if it's 20 years or 100 years I  
13 still just don't understand how the aquifer is  
14 moving that slow.

15           I know that they are slower here in  
16 Arizona than they are in some other states  
17 because of the desert environment.

18           But the water is moving. And I  
19 haven't seen the study that shows that the 200  
20 mile movement. I did ask for it but I didn't get  
21 that.

22           So I guess my bottom line is there has

1 not been an aquifer exemption applied for here by  
2 Florence Copper so I can't see how the EPA can  
3 transfer this when they made Florence Copper come  
4 back in and reapply.

5           And on their application they say that  
6 they own the land and that's not the case. They  
7 are leasing the land. So the application  
8 technically is incorrect.

9           So in summary that's most of my items.  
10 Is there any other questions?

11           JUDGE AVILA: No. Thank you very  
12 much, Mr. Anderson. We appreciate your  
13 presentation.

14           We'll hear now from Region 9.

15           MR. MINOR: Good afternoon, Your  
16 Honors. Dustin Minor representing Region 9.

17           Region 9 shares Mr. Anderson's  
18 concerns about protecting the town's drinking  
19 water and we've developed a permit consistent  
20 with the UIC regulations in the Safe Drinking  
21 Water Act that does so.

22           Although Mr. Anderson did not identify

1 contested permit conditions in his application we  
2 interpreted his petition to address the no  
3 migration between USDWs and adequate protection  
4 of USDWs.

5           And the permit is designed to do just  
6 that. It is designed to ensure that the  
7 injection and recovery zone, that all injectate  
8 is maintained within that during the operational  
9 life of the PTF as well as the rinsing process.

10           At the conclusion of the proposal life  
11 and the rinsing process there will be restoration  
12 to MCLs or background, whichever is higher, and a  
13 monitoring network outside of the injection and  
14 recovery zone in the unlikely event that there  
15 may be an excursion.

16           JUDGE LYNCH: Counsel, am I reading  
17 the region's response correctly in that you take  
18 the position that this proposed permit is more  
19 stringent than the BHP permit?

20           MR. MINOR: Yes. There are numerous  
21 additional monitoring parameters that have been  
22 added.

1           JUDGE LYNCH: You make a statement to  
2 that effect on page 10 of the statement of basis  
3 and page 10 and 12 of your response. Could you  
4 be a little more specific?

5           MR. MINOR: Yes. So, in part in  
6 response to address comments made by petitioners  
7 additional changes were added. And these include  
8 monitoring at the interface between the oxide  
9 zone and the LBFU to detect any excursions which  
10 could occur if there isn't adequate hydraulic  
11 control.

12           JUDGE LYNCH: And that didn't exist in  
13 the previous permit?

14           MR. MINOR: Correct. There was also  
15 additional electronic conductivity monitoring  
16 that was required.

17           The proposed initial permit had more  
18 frankly than the BHP permit did, but in addition  
19 to that some of the commenters pointed out that  
20 there could be a better design.

21           And so the region had Florence Copper  
22 change the permit to require a statistical

1 baseline study to show background electrical  
2 conductivity and then measure electrical  
3 conductivity at the edge of the injection and  
4 recovery zone.

5 So it's really a three-part process to  
6 maintain hydraulic control extracting 110 percent  
7 more than is injected which would have been  
8 similar to the BHP.

9 JUDGE AVILA: And at the edge, the  
10 conductivity at the edge of the injection zone,  
11 if that the provision that was added to the final  
12 permit that wasn't in the draft?

13 MR. MINOR: There was electrical  
14 conductivity monitoring in the draft, but some of  
15 the commenters pointed out that it's a little bit  
16 difficult to ascertain whether that's showing an  
17 excursion or not if you don't do a better  
18 statistical analysis on what the background is  
19 because what you're trying to show is an increase  
20 in the recovery zone from the outside area.

21 And so there will be additional  
22 analysis that's done and parameters that are set

1 up as they go through the aquifer testing before  
2 they start to establish that baseline that was  
3 added to be more protective.

4 JUDGE WARD: If I could follow up on  
5 a different topic concerning the BHP pilot test  
6 and the results of restoration after that test.

7 Mr. Anderson made the point that  
8 really could you rely on that, it was just one  
9 test for a very brief period of time. What does  
10 that tell you about the success of restoration at  
11 the production test facility here.

12 MR. MINOR: Well, I think given the  
13 differences between that production test and  
14 this, and the additional safeguards that are  
15 provided here since they were able to restore  
16 hydraulic control when it was briefly lost a few  
17 times under the BHP test and restore that portion  
18 of the aquifer after it was completed I think  
19 that is illustrative to demonstrate that this  
20 area will be able to be restored as well.

21 JUDGE LYNCH: And what's your response  
22 to the uranium mining examples? And I think in

1 your response you acknowledge that there are  
2 problems, documented problems.

3 MR. MINOR: Yes, the uranium mining  
4 occurs in different ore bodies and so there's  
5 different characteristics hydrogeologically in  
6 uranium and they also have different injectate.

7 But we do acknowledge that there has  
8 been some difficulty in restoring some uranium  
9 mines to background for all constituents.

10 But we really believe that the best  
11 indicator here is what occurred before, BHP  
12 Copper, and the additional protections in this  
13 permit will allow that.

14 JUDGE WARD: And I think another issue  
15 Mr. Anderson raised concerned the statements in  
16 the record both in the statement of basis and  
17 then in the response to comments that it would  
18 take 200 years before the groundwater would reach  
19 the communities, the nearest drinking water well.

20 What were those calculations based on?

21 MR. MINOR: So, as part of our current  
22 source analysis for the looking at whether the

1 area impacted by the PTF continues to meet the  
2 aquifer exemption criteria we looked at the  
3 useful life of the existing wells and whether  
4 they could potentially be impacted.

5 And that's really based on no  
6 containment. That's just if you at the end of  
7 the process when the aquifer is restored how long  
8 would it take a molecule to get from the  
9 production test facility to the current wells.

10 And that modeling shows for the active  
11 wells it would be over 200 years and for the  
12 inactive wells over a mile away it would be over  
13 100 years.

14 JUDGE AVILA: And what's the useful  
15 life of a drinking water well?

16 MR. MINOR: That is based on a variety  
17 of factors, but sometimes we look 30 to 50 years.  
18 Arizona talks about 100 years in some of their  
19 state provisions.

20 But we were confident that the 100 to  
21 200 lifetime here exceeded the usable life in  
22 this scenario.

1 JUDGE WARD: If I could just follow up  
2 on the reference to modeling. One model,  
3 multiple models, and whose models were they?

4 MR. MINOR: Well, Florence Copper did  
5 multiple different model runs and showed a number  
6 of different analysis including the faults that  
7 Mr. Anderson was referring to. Those faults were  
8 taken into account in the modeling.

9 And we believe that the hydraulic  
10 control will be effective notwithstanding those  
11 faults.

12 But we also placed the location of the  
13 monitoring wells based on the Sidewinder fault in  
14 particular. Even though the faults naturally go  
15 down we did put as though they would probably not  
16 go towards the LBFU.

17 We put monitoring wells in such a  
18 location that if they were to go through the  
19 faults that would be detected and could be  
20 addressed and restored.

21 JUDGE AVILA: On that could you just  
22 -- this is kind of a 50,000 foot level question.

1 Do you have the permit in front of you by chance?

2 MR. MINOR: I have it right here, yes.

3 JUDGE AVILA: So on page 23 on the  
4 monitoring program it talks about seven  
5 additional monitoring wells required by EPA and  
6 the MW01 operating monitoring well.

7 And then it also talks about post POC  
8 and water quality monitoring well locations  
9 depicted.

10 Can you just tell me how many  
11 monitoring wells there are that are required by  
12 this permit and where they're located? Are they  
13 within the area of review? Are they near the  
14 well field? Are they outside the area of review?

15 I'm just having a hard time putting  
16 all the maps and things together.

17 MR. MINOR: Yes. Maybe if I show you  
18 -- figure out how to turn this on.

19 So first of all, the hydraulic control  
20 wells --

21 JUDGE AVILA: Which figure is this?

22 MR. MINOR: This is figure -- and Mr.

1 Anderson, I did send him a copy of these two  
2 figures that we said we may use so if you want to  
3 pull this out. It is figure P1.

4 JUDGE AVILA: Okay.

5 MR. MINOR: And what you will see here  
6 on this circle if you can see that I'm pointing  
7 to that goes around the well field, those squares  
8 are the observation wells.

9 And so the observation wells are the  
10 wells that are used to maintain hydraulic control  
11 and are measuring the electrical conductivity and  
12 the gradient for that purpose.

13 And then the monitoring wells, the  
14 groundwater flow is to the northwest here so it's  
15 this direction are just outside -- there's  
16 numerous monitoring wells and you can see they're  
17 screened in different zones. Are you following  
18 me on the map?

19 There's one just outside in the LBF  
20 and the UBF. It's hard to point right there.  
21 And then another one in the oxide zone.

22 The well up here at the top, M58, is

1 the well that's designed to detect any excursion  
2 that may occur from the Sidewinder fault if that  
3 were to occur.

4 And then we have some wells up  
5 gradient. The monitoring well 59 in the oxide  
6 zone and 61 in the LBF which help establish  
7 background and also show if there's anything  
8 moving in a direction that we don't understand.

9 So all of those wells are within the  
10 area of review.

11 And then just outside of the area of  
12 review --

13 JUDGE AVILA: I'm sorry to interrupt.  
14 And all those are required by the permit.

15 MR. MINOR: Yes. And then just  
16 outside of the area of review there was another  
17 monitoring well that's required in the oxide zone  
18 in the LBF that's on the northwest which is the  
19 direction the groundwater flows in the area.

20 And then finally these wells over here  
21 are wells that are required by the Arizona  
22 aquifer protection permit and are frankly a

1 little bit further than would be useful during  
2 the opinion of the PTF.  
3 Maybe during the monitoring which we  
4 could extend beyond five years if necessary could  
5 be useful.

6 JUDGE AVILA: And so not to belabor  
7 this, but the ones, the M54 LBF, that's required  
8 by the permit too? Or is that?

9 MR. MINOR: Yes.

10 JUDGE LYNCH: And the Arizona wells  
11 are water quality?

12 MR. MINOR: Yes. All the wells  
13 outside of the injection recovery zone are  
14 measuring the water quality for the different  
15 constituents as opposed to just the hydraulic  
16 control on the observation wells.

17 JUDGE WARD: If I could ask another  
18 follow-up question on a related topic, but I'm  
19 looking at the response to comments at 13 and  
20 there is a statement there in terms of EPA is  
21 disputing the vertical migration of the injected  
22 fluids into the lowermost portion of the LBFU

1 anything if it occurs.

2 But if for some reason there wasn't  
3 the ability to maintain hydraulic control which  
4 I'm not sure if that's your question then there  
5 could be some migration into the LBFU which  
6 should be detected, and the permit would require  
7 restoration of that or restoring hydraulic  
8 control to pull it back in, whatever was  
9 necessary.

10 So I'm not sure if that answers your  
11 question.

12 JUDGE WARD: I think we were just  
13 trying to -- in looking at the response to  
14 comments at 13 and then 19 there's a statement  
15 that I guess in connection with the BHP site it  
16 was predicted that fluids could go into the LBFU  
17 20 to 40 feet.

18 But then later you say in terms of  
19 these operations that vertical excursions are  
20 expected to result in no significant migration of  
21 injected solution.

22 We wanted to know is there anything --

1 during PTF operations is likely to occur.

2 And then there's a further statement  
3 that it's not expected to be significant under  
4 normal operating conditions.

5 And we don't have a cite here for the  
6 source for those statements. What are those  
7 statements based on?

8 MR. MINOR: Well, I think that the  
9 statements are based on the modeling and the  
10 requirements in the permit to maintain hydraulic  
11 control.

12 Injection is only allowed 40 feet  
13 below the top of the oxide zone. And the  
14 injection recovery wells are designed to maintain  
15 an inward gradient. So there's not expected to  
16 be any migration into the LBFU. That would  
17 indicate a loss of hydraulic control during the  
18 operation.

19 But we did in response to the comments  
20 and to have a more protective permit add those  
21 monitoring wells at the interface between the  
22 LBFU and the oxide zone which should detect

1 when you say it's not going to be a significant  
2 migration is there a number that that -- is it  
3 like 1 foot, or 2 foot, or zero, or it's just not  
4 expected at all under normal operating  
5 parameters.

6 MR. MINOR: It's not expected at all  
7 in the normal operating parameters, but it is an  
8 active injection and recovery zone so it is  
9 acknowledged that it could occur.

10 That's what part of the monitoring is  
11 there, to observe and if it did occur would  
12 require either less pumping or -- more pumping or  
13 less injection to make the gradient so that it  
14 doesn't continue and to pull it back.

15 And so there wasn't that level of  
16 monitoring because that is part of an exempt  
17 aquifer in the '97 permit. So I'm not exactly  
18 sure what you're referring to in the '97 permit  
19 that's different there.

20 JUDGE WARD: I think it's just the  
21 reference in the response to comments one place  
22 that there could be -- and I'm reading it as

1 vertical migration of 20 to 40 feet under those  
2 normal operations.

3 And here it's not expected to be  
4 significant. And do we have a number in terms of  
5 what does significant mean in that context.

6 MR. MINOR: I mean, again I think --  
7 I'll just add to that, I see I'm almost out of  
8 time, but the idea is to have none. And to  
9 correct it if there is any.

10 But there is an acknowledgment once  
11 the production test facility finishes the  
12 injection recovery as well as the rinsing that  
13 then you will no longer maintain hydraulic  
14 control.

15 And after you do that you should have  
16 restored that area to MCLs or background,  
17 whichever is higher.

18 And so there will be some migration of  
19 that material which is protective into the LBFU  
20 and I'd have to look and get back with you if you  
21 want, if that's what you're referring to on 13  
22 and 19.

1 But if after it gets up and running  
2 that isn't sufficient we have the authority to  
3 require more extraction to basically true up the  
4 model.

5 JUDGE WARD: But the modelings in both  
6 instances were ones that were developed or used  
7 by Florence Copper.

8 MR. MINOR: Yes. Reviewed by us.

9 JUDGE WARD: And included in their  
10 permit application?

11 MR. MINOR: Yes.

12 JUDGE WARD: Okay. I just wanted to  
13 confirm that.

14 JUDGE AVILA: Do you happen to know,  
15 is the Arizona geological survey that was  
16 attached to Mr. Anderson's petition, was it  
17 submitted with his comments? I think you argued  
18 in your brief that it wasn't.

19 MR. MINOR: No, it's actually dated  
20 August 2015 I believe which was after his  
21 comments.

22 JUDGE WARD: Just, I'm reading the

1 JUDGE WARD: That's okay. I think you  
2 may have said earlier in those statements in 13  
3 and 19 as it relates to current operations are  
4 based on what. I think you said --

5 MR. MINOR: Modeling.

6 JUDGE WARD: The same modeling you  
7 were referring to earlier in terms of the  
8 groundwater migration, or different modeling?

9 MR. MINOR: No, those would be  
10 different models. So the model for groundwater  
11 migration was looking as if there was nothing  
12 occurring at the site.

13 For example, when it's completed how  
14 long would it take for a molecule to migrate from  
15 the PTF to the current wells.

16 Whereas the hydraulic control  
17 monitoring is looking at what level do you need  
18 to pump and inject at to maintain hydraulic  
19 control.

20 For example, a 10 percent gradient is  
21 required, 110 percent more extracted than  
22 injected.

1 response to comments and this is at 33 in terms  
2 of the EHP and the groundwater monitoring as it  
3 relates to restoration. And it talks about  
4 quarterly monitoring.

5 So are they still monitoring? Is that  
6 quarterly monitoring for the past 20 years, or  
7 did that end at some point in time?

8 MR. MINOR: I believe that is still  
9 occurring. I know I've seen references to very  
10 recent monitoring and so we have shown that that  
11 area has been restored over time. And I believe  
12 they have another quarterly report that is due  
13 soon.

14 But it definitely occurred for over a  
15 decade or more.

16 JUDGE WARD: And just one last  
17 question from me.

18 So, I think Mr. Anderson's concern is  
19 both with respect to his current well and perhaps  
20 maybe future wells that would be dug or support  
21 that neighborhood.

22 Does the permit address the future

1 wells, and if so, how, and if not, why not?

2 MR. MINOR: Yes, it does. So the

3 permit requires that there be no migration that

4 would impact USDWs. It's a requirement of the

5 Safe Drinking Water Act.

6 So the current source analysis is only

7 done for the purposes of doing an aquifer

8 exemption. Once you have an aquifer exemption in

9 place the permits require maintaining all of the

10 contaminants at least above levels that could be

11 a cause of concern for drinking water within the

12 exempt portion of the aquifer.

13 So even if they were to put wells

14 where Mr. Anderson has suggested down gradient of

15 the exempt portion of the aquifer the permit is

16 designed to ensure that those wells would not be

17 impacted in a way that would impact human health

18 or the ability to utilize those.

19 JUDGE LYNCH: How does it do that?

20 MR. MINOR: It's the same protections

21 that we've been talking about, by requiring

22 hydraulic control during the operation of the PTF

1 and then restoration afterwards.

2 So that anything that would migrate

3 over time from the time that the operations

4 ceased till the time it would get outside of the

5 exempt portion of the aquifer. That it's already

6 restored to protective levels beforehand and then

7 over the 100 years that would be a little bit

8 closer if the well was closer.

9 But the decades it might take to get

10 there in addition to already being at a

11 protective level you would anticipate attenuation

12 as it continued to mix with the background

13 constituents.

14 JUDGE AVILA: Is your point that the

15 new well that Ward hypothesized is not a concern

16 because this permit is going to keep everything

17 within the area of review? Is that essentially

18 what?

19 MR. MINOR: During the operational

20 life of the permit it will keep it all within the

21 area of review, and then it will require

22 restoration of that area and monitoring to ensure

1 that it was effective.

2 But over time the area that you have

3 the injection, the natural flow of groundwater

4 will move. So over the decades it is possible

5 that some residual that had been -- basically the

6 portion of the aquifer that had been in the

7 injection zone could migrate outside of the

8 exempt portion of the aquifer.

9 But the Safe Drinking Water Act and

10 the permit requires that that not be above levels

11 of concern.

12 JUDGE LYNCH: And when you say the

13 exempt portion of the aquifer are you talking

14 about what you focused on for Florence Copper

15 permit, or the extent of the exemption under the

16 '97 exemption?

17 MR. MINOR: Well, when I refer to the

18 exempt portion of the aquifer I'm talking about

19 the 1997 permit.

20 But all the substantive requirements

21 of the permit really apply to the area of review

22 in terms of what is required to be done on the

1 ground by Florence Copper.

2 The hydraulic control is limited to

3 the injection and recovery zone. And the

4 restoration needs to occur in that same area.

5 And the monitoring wells within the

6 area of review are designed to ensure that

7 nothing migrates outside of the area of review

8 above levels of concerns.

9 And we have authority under the permit

10 to require corrective action or contingencies if

11 necessary.

12 So even though it wouldn't be a

13 violation of the Safe Drinking Water Act and an

14 impact to a non-exempt aquifer if it migrated

15 beyond the area of review it would be

16 inconsistent with the requirements of the permit

17 and we could evaluate that and require corrective

18 action if necessary.

19 JUDGE AVILA: What permit provision

20 would that be that would say if it went beyond

21 the area of review you could impose corrective

22 action? If I understood what you just said

1 correctly.

2 MR. MINOR: If you go to page 36 of

3 the permit I believe, I guess I should double-

4 check that. So this is talking about the

5 monitoring for the action levels and the aquifer

6 quality limits.

7 And both 36 and 37 at the end have the

8 same requirement here. It's number -- well, it's

9 really this whole section.

10 So if you look at this whole section

11 on page 36 they're collecting samples under small

12 i (a)(i) and so if those samples show an

13 exceedance there's a whole process to make sure

14 that it's not a natural variation and that it

15 really is representative of an issue that

16 warrants addressing.

17 But if it is then they have to submit

18 a report to us and say what they need to do to

19 address it and mitigate it.

20 So under 4(a) the report requires an

21 evaluation of the cause, impact, or mitigation

22 for the exceedance.

1 And then on 5 it says upon review of

2 the report we can require additional monitoring

3 or action beyond those specified in the permit.

4 What that really means is requiring

5 additional corrective action to address those

6 contaminants.

7 The idea is to catch these before it

8 gets beyond the area of review. So this would be

9 on the monitoring wells that I showed on the map.

10 So if those are showing exceedances

11 above the levels that you would expect after

12 restoration, that would be the MCLs or

13 background, then we can require action to address

14 it.

15 JUDGE AVILA: So even though this

16 doesn't say, and this ties back to our earlier

17 conversation, but even though this doesn't say

18 anything about the area of review because -- I

19 take it because it's tied to the monitoring wells

20 which as you showed me on figure P1 those are

21 inside the area of review, that's how you could

22 make the statement that this would kick in before

1 a contaminant got outside the area of review.

2 MR. MINOR: Yes. And there is the

3 sort of last line of defense for the monitoring

4 wells in the northwest direction outside of the

5 area of review as well that we would not expect

6 to ever see something at but is there.

7 JUDGE AVILA: Thank you very much.

8 MR. MINOR: Thank you.

9 JUDGE AVILA: We'll hear from Florence

10 Copper now.

11 MR. ANDERSON: This is John Anderson.

12 Can you hear me?

13 JUDGE AVILA: Yes, but we're going to

14 hear from Florence Copper right now.

15 MR. ANDERSON: Okay. I want to do a

16 rebuttal then later on.

17 JUDGE AVILA: Thank you. Given that

18 we went over with Region 9 we'll give you a few

19 more minutes to have rebuttal once we hear from

20 Florence Copper.

21 MR. ANDERSON: Okay, thank you.

22 JUDGE AVILA: No problem.

1 MR. TSIOLIS: Thank you, Your Honors,

2 for the opportunity to speak on behalf of

3 Florence Copper. My name is Jorge Tsiolis. I'm

4 a sole practitioner and I don't know if that

5 entitles me to feel this way but I feel like a

6 kindred spirit when it comes to pro se

7 appellants. I have great respect for the right

8 of pro se appeals. I consider it to be an

9 exercise of a fundamental First Amendment right

10 of free expression.

11 But I'm also a strong proponent of

12 procedural due process rights. And that includes

13 especially the procedural due process rights of

14 my clients.

15 And the way that the Board's appeal

16 rules harmonize those competing interests in

17 123.19(a)(4)(I)(i) and (ii) is basically to

18 require the petition to satisfy certain threshold

19 pleading requirements that are designed to elicit

20 a response.

21 The petitioner below when he or she

22 files comments is supposed to make the comments

1 with reasonable particularity so that they can  
2 reasonably elicit a substantive response from the  
3 region, from the permit issuer.

4 And in making arguments in the  
5 petition is supposed to again make comments  
6 regarding the permit with reasonable  
7 particularity to a degree sufficient to elicit a  
8 substantive response not just from the permit  
9 issuer but from the permittee.

10 And those requirements have completely  
11 not been satisfied. In fact, all of the issues  
12 that have been discussed up until now with one  
13 exception, the 20-year migration issue, was not  
14 raised in the petition for review.

15 The only thing that I see in the  
16 petition for review and I have it before me, and  
17 this was something that we were scratching our  
18 heads how to respond to it was very general  
19 statements along the lines of the loss of leech  
20 solution can result in groundwater contamination.

21 Okay. It's generally very difficult  
22 to observe what is really happening below the

1 earth's surface. Again, okay. Et cetera. Those  
2 kinds of statements.

3 Nowhere does the petition challenge --  
4 identify a permit condition that it's  
5 challenging.

6 And that's a basic requirement of a  
7 petition for review. Nowhere does the petition  
8 demonstrate that any of the issues that it raised  
9 in the petition were raised below.

10 There's no tie-in as is required in  
11 (ii) of (a)(4), .19 between the petition and the  
12 comments that were raised below.

13 To the extent that the Board is minded  
14 to consider that issues of the aquifer exemption  
15 which were discussed earlier in the discussion  
16 with Mr. Anderson and issues related to zoning  
17 were properly raised in the petition which they  
18 were not, they weren't raised in the comments  
19 below.

20 The 20-year migration issue as Your  
21 Honor pointed out, there's nothing in the record  
22 that shows, there's no transcript of the hearing

1 that shows that that issue was raised by Mr.  
2 Anderson below.

3 Any technical questions that are  
4 raised now by Mr. Anderson during his  
5 presentation frankly I'm not prepared to answer  
6 them because they are a surprise.

7 Fundamentally --

8 JUDGE WARD: But is that really true  
9 at least as it relates to the USGS survey and the  
10 experience at uranium mines. I take your  
11 argument to be that Mr. Anderson didn't cite  
12 either his comments or where that was addressed  
13 by the region in the response to comments.

14 But I think at page 33 of the response  
15 to comments that issue does seem to be -- to have  
16 been joined.

17 So someone raised it I presume. And  
18 Mr. Anderson could answer whether it was him. I  
19 guess I'm going into this assuming it was  
20 probably his comment.

21 But regardless, focusing on the  
22 comment itself it does appear to have been an

1 issue that was raised below.

2 MR. TSIOLIS: To the extent that it is  
3 deemed to be raised below it does not appear to  
4 be something that addresses a specific condition  
5 in the permit.

6 We don't know how to tie any  
7 discussion of an Arizona geological survey  
8 report. I'm at a loss how to tie that to an  
9 issue that's being challenged -- with a condition  
10 that's being challenged, permit condition that's  
11 being challenged by the petition.

12 JUDGE WARD: So I don't have the  
13 regulatory language right in front of me, but I  
14 think it's both a condition of the permit, but  
15 there's a phrase I think in the regulation that  
16 talks -- that really addresses more generally.

17 So if there were an issue, if there  
18 were a situation where the agency had failed to  
19 take public comment and that was the argument  
20 that basically it was a fatal flaw to the whole  
21 permit issuance process.

22 That's not really raising an objection

1 to a specific permit condition, but that would be  
2 a permissible argument under our regulations.

3 MR. TSIOLIS: Yes.

4 JUDGE WARD: So if there were an  
5 argument to be had that the concern being raised  
6 here is one going to the region's analysis that's  
7 supporting fundamentally the issuance of the  
8 permit wouldn't that fit in the same category?

9 MR. TSIOLIS: Absolutely it would,  
10 Your Honor. In that respect we defer to the  
11 region's expertise. We are content with the  
12 region's analysis.

13 We think moreover that the region did  
14 a very good job in adding additional conditions  
15 to the permit that are designed to prevent the  
16 migration of injectate and formation fluids that  
17 are displaced by the injectate beyond the  
18 boundaries of the aquifer exemption.

19 And we support the region's findings  
20 in that regard.

21 JUDGE LYNCH: Well, isn't it also true  
22 that the region identified two permit conditions

1 in its January stay notice?

2 MR. TSIOLIS: Yes, Your Honor. But  
3 you know, we disagree with that stay notice.

4 JUDGE LYNCH: Yes, I notice that.

5 MR. TSIOLIS: And the reason we  
6 disagree with that stay notice is because first  
7 of all I don't know to what -- and I can't speak  
8 for regional counsel, I don't know to what extent  
9 they were involved in the drafting of that stay  
10 notice, but we believe that staff that issued  
11 that stay notice had a fundamental  
12 misunderstanding of how the stay process works.

13 The requirement to identify conditions  
14 that are being challenged and then decide which  
15 of those conditions should be stayed during the  
16 pendency of a petition for review applies only  
17 when the permit conditions at issue concern  
18 existing wells and appurtenances.

19 This permit concerns new wells and  
20 appurtenances. So the difference is between  
21 124.16(a)(1) and 124.16(a)(2). (a)(2)(i) is the  
22 provision of that rule that requires the agency

1 to go through that exercise.

2 And my guess has always been that the  
3 agency staff felt that they had to find a way to  
4 hold the permit in its entirety in abeyance  
5 essentially while the petition was being  
6 considered.

7 But all they needed really to do is  
8 realize that this permit concerns new wells and  
9 new appurtenances, and under (a)(1) that entitles  
10 the agency to say that there's an automatic stay  
11 of the entire permit.

12 It says that the permittee will be  
13 deemed to essentially be without a permit while  
14 the petition for review is being heard.

15 Had they just relied on the automatic  
16 stay provision of the rule they would not have  
17 had to have gone through the exercise of  
18 discerning -- of inferring a challenge to a  
19 permit.

20 It's interesting to note that in the  
21 first page of that stay notice they say that the  
22 petition for review -- now this is applicable to

1 the town of Florence, but they say that the  
2 petition for review, also for John Anderson, for  
3 all three petitions, don't clearly identify  
4 challenges to a permit decision.

5 Well, guess what. That's actually a  
6 requirement of 124.19(a)(1). It has to clearly  
7 identify a contested permit condition in order to  
8 cognizable before the Board.

9 JUDGE AVILA: I have 124.19(4) before  
10 me. It says petitioner for review must identify  
11 the contested permit condition or other specific  
12 challenge to the permit decision. And I think  
13 that's the language that Judge Ward was talking  
14 about.

15 MR. TSIOLIS: Yes, Your Honor, that's  
16 exactly what it says.

17 JUDGE AVILA: So why isn't it a valid  
18 argument that the mitigation analysis is so  
19 erroneous that the whole permit fails regardless  
20 of whether it's tied to a particular -- which I  
21 take is what Mr. Anderson is saying.

22 MR. TSIOLIS: We defer again to the

1 technical analysis of Region 9 in its  
 2 determination that the permit conditions are  
 3 sufficient to ensure that fluids don't migrate  
 4 beyond the boundaries of the exemption.  
 5 All we're saying is that we disagree  
 6 with the stay notice. We don't think that  
 7 certainly Mr. Anderson's petition challenge to  
 8 any permit conditions or even made another  
 9 specific challenge to the permit decision.  
 10 And moreover the stay notice was not  
 11 necessarily. They could have just held that it  
 12 was an automatic stay and held the entire permit  
 13 in abeyance during the petition for review being  
 14 heard by this Board.  
 15 JUDGE LYNCH: Well, whether it was  
 16 necessary or not the two conditions that the  
 17 region inferred were implicated by Mr. Anderson's  
 18 petition was the exempted zone and then the no  
 19 migration.  
 20 And we've certainly been talking about  
 21 that a lot today and the briefs address it.  
 22 MR. TSIOLIS: We're prepared to talk

1 about that Your Honor, certainly. I mean, is  
 2 there any question about the exemption that I can  
 3 answer.  
 4 Is there any question about the  
 5 exemption that I can answer even though it wasn't  
 6 in Mr. Anderson's petition. The word "exemption"  
 7 isn't even in there. But I'd be happy to answer  
 8 any questions relating to Mr. Anderson's petition  
 9 regarding the exemption.  
 10 JUDGE WARD: If I could follow up on  
 11 that. I think we've given the region an  
 12 opportunity to respond to some of the points that  
 13 Mr. Anderson did make in his argument.  
 14 And I think specifically with respect  
 15 to the 200-year migration analysis as well as the  
 16 point about will it stay within the area of  
 17 review, in fact even within the bedrock, the  
 18 oxide bedrock zone which Mr. Anderson appears to  
 19 disagree with.  
 20 Do you have anything to respond in  
 21 terms of what Mr. Anderson had to say?  
 22 MR. TSIOLIS: Oh no, no. Again we

1 incorporate by reference all of the responses  
 2 that Region 9 made.  
 3 We also think the Board to your credit  
 4 has gone way beyond what In Re: Seneca Resources  
 5 Corp requires when it comes to pro se  
 6 petitioners.  
 7 We're happy that you've done that and  
 8 we're prepared to either answer any legal  
 9 questions that arise from the petition, but on  
 10 technical issues we need to defer to Region 9's  
 11 findings.  
 12 JUDGE LYNCH: Well, and I'd like to  
 13 answer your question about whether I have any  
 14 questions about the exempted zone.  
 15 Why did Florence Copper propose a  
 16 smaller exemption zone?  
 17 MR. TSIOLIS: I have no idea, Your  
 18 Honor. What I do know is Region 9 said no, you  
 19 don't need to do that. You should rely on the  
 20 existing exemption. And Florence Copper said  
 21 fine.  
 22 JUDGE LYNCH: And you have no idea why

1 because?  
 2 MR. TSIOLIS: Because I wasn't privy  
 3 to the discussion and I haven't bothered to find  
 4 out why that was the case.  
 5 What I'm here to do is to lend support  
 6 to the decision to -- by Region 9 not to reopen  
 7 the question of a 20-year old exemption in the  
 8 context of this current proceeding. And I can  
 9 speak to that.  
 10 JUDGE AVILA: Thank you very much.  
 11 MR. TSIOLIS: Thank you.  
 12 JUDGE AVILA: We'll give Mr. Anderson  
 13 five minutes of rebuttal time since we went over.  
 14 MR. ANDERSON: Okay, ready? Thank  
 15 you.  
 16 First, on the EPA did they conduct any  
 17 modeling to confirm the Florence Copper modeling?  
 18 And did the EPA consider any experience that  
 19 Florence Copper did similar to injection process  
 20 in other hydraulic conditions.  
 21 If not, how does Region 9 have any  
 22 assurances that the Florence Copper model works

1 and is the controlled hydraulic pressure or  
2 implement the control measures required by Region  
3 9.

4 Second, has the EPA ever granted a  
5 permit, an exception for this type of process,  
6 and has the EPA ever done this by transfer of a  
7 permit.

8 And the last thing, the EPA talks  
9 about pumping out 110 percent. They're going to  
10 take 10 percent out more than was put in and  
11 that's part of their control. I understand that.

12 But my question is where does the  
13 other 10 percent come from if this water is not  
14 migrating.

15 By common logic it says they're going  
16 to pump the thing dry in a very short time if we  
17 don't have migration.

18 That water is coming from somewhere.  
19 It's moving around. That's the reason I don't  
20 believe their 200-year model or their 100-year  
21 model.

22 By their own process they're taking

1 out more water than they're putting in. That  
2 water has to be migrating from somewhere. Thank  
3 you.

4 JUDGE AVILA: Thank you very much, Mr.  
5 Anderson. Okay. UIC appeal number 17-01 is  
6 submitted and we'll proceed to argument on UIC  
7 appeal number 17-03.

8 How will the town of Florence and SWVP  
9 be splitting their time?

10 MS. PASHKOWSKI: Thank you, Your  
11 Honor, I'm Barbara Pashkowski for the town. I'm  
12 going to take roughly 5 minutes to make some  
13 opening comments and Mr. Franco is going to take  
14 about 15 and reserve 5 for rebuttal is our  
15 current plan.

16 JUDGE AVILA: Okay.

17 MS. PASHKOWSKI: Thank you again and  
18 may it please the Board. On behalf of the town  
19 of Florence we've heard although the appeals from  
20 Mr. Anderson and the town are on separate issues  
21 we certainly heard some very important policy  
22 issues raised here this afternoon and I'd like to

1 expand on those a little bit.

2 A revocation of the 1997 aquifer  
3 exemption should have been done and as required  
4 here. The permit submitted by Florence Copper  
5 should have been -- was remanded.

6 The EPA asked Florence Copper to  
7 resubmit an application. Initially Florence  
8 Copper submitted a permit for transfer and that  
9 was denied by EPA.

10 Someone, one of the Board members  
11 asked a question about why didn't Florence Copper  
12 submit a smaller aquifer exemption permit  
13 request.

14 In their original application for the  
15 permit transfer that's exactly what they did.  
16 They requested an aquifer exemption just for the  
17 production test facility.

18 EPA then obviously revoked the  
19 original 1997 permit and asked Florence Copper to  
20 resubmit its application.

21 And in that process the aquifer  
22 exemption was allowed to stand for the entire

1 greater area beyond protection test facility.

2 JUDGE LYNCH: Counsel, what's your  
3 response to the fact that on the face of the  
4 aquifer exemption it says it has no expiration  
5 date.

6 MS. PASHKOWSKI: We understand that  
7 argument. We don't agree with that argument.

8 And we think --

9 JUDGE LYNCH: It's not an argument,  
10 it's the language. Tell me what your argument  
11 is.

12 MS. PASHKOWSKI: No, I understand that  
13 the exemption exists. But there is EPA guidance,  
14 there is case law that allows EPA to go back and  
15 revisit exemptions. And there's no reason why  
16 they should not have done that here.

17 JUDGE LYNCH: Is there a requirement  
18 that they have to revisit it?

19 MS. PASHKOWSKI: There is not a  
20 requirement, but there is certainly policy  
21 considerations in this case where they should  
22 have.

1 EPA when it revoked and remanded or  
 2 requested a reissuance of the permit pointed out  
 3 significant changes of circumstances.  
 4 JUDGE LYNCH: Did you petition the  
 5 agency to revisit or revoke the aquifer  
 6 exemption?  
 7 MS. PASHKOWSKI: That's what we're  
 8 doing here. Are you talking about in 1997?  
 9 JUDGE LYNCH: Are you saying that this  
 10 permitting proceeding is the same as an aquifer  
 11 exemption proceeding?  
 12 MS. PASHKOWSKI: If you look at the  
 13 permit page 5 or 7 there is a provision in there  
 14 identifying the aquifer exemption.  
 15 JUDGE LYNCH: The aquifer exemption  
 16 that's legally valid.  
 17 MS. PASHKOWSKI: The one that existed  
 18 since 1997.  
 19 JUDGE LYNCH: Right. So do you  
 20 disagree that there are separate procedures for  
 21 processing aquifer exemptions?  
 22 MS. PASHKOWSKI: If you're asking me

1 if I think this is not the correct venue for this  
 2 aquifer exemption my answer is no, I think this  
 3 is the correct venue.  
 4 We have no other venue. We have no  
 5 other venue. If we're not allowed to contest a  
 6 permit condition, and that aquifer exemption is a  
 7 permit condition, if we're not allowed to do that  
 8 in this process I don't know where we are allowed  
 9 to do it.  
 10 JUDGE LYNCH: Have you considered  
 11 filing a petition to the agency to revoke or  
 12 revisit the aquifer exemption?  
 13 MS. PASHKOWSKI: No, because we did it  
 14 in this process. So if we had that opportunity  
 15 maybe depending on what the Board rules we may  
 16 have to go that route. But we think this is  
 17 legally the proper venue. It's a permit  
 18 condition. There's no reason why we can't ask  
 19 the Board to review it here.  
 20 EPA has the discretion to change the  
 21 aquifer exemption even though the exemption says  
 22 it does not expire. They've done it in other

1 cases. They've done it in cases --  
 2 JUDGE LYNCH: Who's done what?  
 3 MS. PASHKOWSKI: EPA has reconsidered  
 4 exemptions in the past.  
 5 JUDGE LYNCH: Are you aware of the  
 6 Board ever reconsidering an aquifer exemption?  
 7 MS. PASHKOWSKI: No.  
 8 JUDGE LYNCH: Are you aware of the  
 9 Board's delegated authority?  
 10 MS. PASHKOWSKI: Yes.  
 11 JUDGE LYNCH: To review permits.  
 12 MS. PASHKOWSKI: Yes.  
 13 JUDGE LYNCH: And issuance of permits.  
 14 MS. PASHKOWSKI: Yes.  
 15 JUDGE LYNCH: So your position is that  
 16 the Board has jurisdiction and authority to order  
 17 the revocation of an aquifer exemption. That's  
 18 your legal position.  
 19 MS. PASHKOWSKI: My position is you  
 20 have the authority to remand this permit that  
 21 includes an aquifer exemption provision.  
 22 JUDGE LYNCH: So your request for

1 relief asks us to remand with an order to revoke  
 2 the aquifer exemption.  
 3 MS. PASHKOWSKI: Greater exemption,  
 4 yes.  
 5 JUDGE LYNCH: Are you asking us to  
 6 order any change in any other terms of the  
 7 permit?  
 8 MS. PASHKOWSKI: No. Our appeal is  
 9 limited to the aquifer exemption.  
 10 JUDGE AVILA: I'm a little confused.  
 11 So you're saying because the aquifer exemption is  
 12 included in the permit that's what gives us  
 13 authority to review it?  
 14 MS. PASHKOWSKI: Yes.  
 15 JUDGE AVILA: And so even though I  
 16 thought you admitted that on its face it has no  
 17 expiration date, what's the effect of taking it  
 18 out of the permit? It still exists in the world.  
 19 MS. PASHKOWSKI: I'm sorry?  
 20 JUDGE AVILA: It still exist. Even if  
 21 it were not part of the permit the aquifer  
 22 exemption would still exist, right?

1 MS. PASHKOWSKI: Yes. What we're  
2 asking the Board to do -- so the permit includes  
3 the aquifer exemption as a permit term. We've  
4 appealed the permit. We've asked this Board to  
5 revoke and remand so that EPA can revisit the  
6 exemption.

7 And we're not asking for no exemption.  
8 We're saying the exemption should be consistent  
9 with the production test facility which is what  
10 FCI asked for originally.

11 And in fact, EPA in 2010 when it  
12 ordered FCI to reapply for the permit asked them  
13 to define the aquifer exemption boundary, or to  
14 confirm that it should remain large.

15 Why would they do that if EPA did not  
16 feel it had the discretion to reduce the  
17 exemption? It has that discretion. And we  
18 believe the Board has the authority.

19 JUDGE WARD: So, in reading the record  
20 and tell me if I'm reading it correctly, this  
21 property or the larger property in question which  
22 is within the boundaries of the aquifer, the

1 current, the '97 aquifer exemption, that was  
2 annexed to the town back in 2003?

3 MS. PASHKOWSKI: That's correct.

4 JUDGE WARD: And since, between 2003  
5 and today you haven't separately pursued with EPA  
6 a revision, a revocation, or modification to the  
7 aquifer exemption, correct?

8 MS. PASHKOWSKI: We have not.

9 JUDGE WARD: If you had or if EPA had  
10 sought to independently reopen the aquifer  
11 exemption let's say back in 2010 and had done so  
12 and modified it in some way or reaffirmed it,  
13 where would -- if a party wanted to challenge  
14 that decision where would they have to go?

15 MS. PASHKOWSKI: They would have had  
16 to -- if they did not agree with whatever  
17 decision EPA made back then they would be filing  
18 an appeal just like we are filing an appeal.

19 JUDGE WARD: But not with the Board,  
20 correct? It would go to the court of appeals.

21 MS. PASHKOWSKI: I believe that's  
22 correct, yes.

1 JUDGE AVILA: And in the same vein if  
2 we were to grant you the relief you requested and  
3 ordered the region to revisit the aquifer  
4 exemption and they did, and whatever result they  
5 came up with, if you were dissatisfied with that  
6 result where would you go? You wouldn't come to  
7 us. You'd go to a federal court of appeals,  
8 right?

9 MS. PASHKOWSKI: Yes.

10 JUDGE AVILA: I just want to make sure  
11 I heard you correctly. I thought you said you  
12 thought the exemption should consist of the PTF.

13 MS. PASHKOWSKI: That's correct.

14 JUDGE AVILA: Including -- now as I  
15 understand it the PTF includes part of the LBFU.

16 MS. PASHKOWSKI: Well, we don't agree  
17 -- if you read, and I know you have read our  
18 appeal, we don't agree with that provision either  
19 so just so I'm clear. Yes, thank you.

20 JUDGE AVILA: That's why I'm trying to  
21 be clear about exactly what you're arguing.

22 MS. PASHKOWSKI: Smaller area and not

1 include -- the exemption should not include the  
2 lower basin fill unit. That is the town's  
3 drinking water source.

4 And as I'm sure you know Arizona is a  
5 desert. We have desert conditions. We've been  
6 in a drought for over 20 years. We're still in a  
7 drought. And water as Mr. Anderson said is more  
8 precious than mineral.

9 And the town has expanded  
10 tremendously. There have been significant  
11 changes in circumstances and EPA recognized that  
12 when they ordered that the permittee reapply for  
13 the application because there has been  
14 significant development.

15 The area of land owned back in 1997  
16 was I think like 10 miles surrounding the mine  
17 area. It's now reduced significantly.

18 FCI only owns or leases about 1,300  
19 acres now compared to I think over 10,000 when  
20 Magma initially received a permit.

21 So there are significant changes in  
22 circumstances. We do believe that the Board has

1 the authority in light of the fact that this is  
2 the -- the exemption is part of the permit, is a  
3 condition of the permit, to revoke and remand  
4 this back to EPA to design an exemption that's  
5 more consistent with production test facility.

6 JUDGE WARD: I hear your argument  
7 about the aquifer exemption and its inclusion of  
8 the LBFU.

9 Is there any other factual finding in  
10 the record that you're challenging here? I'm not  
11 seeing any, but I just wanted to make sure that's  
12 correct.

13 MS. PASHKOWSKI: Those two issues.  
14 The area extent and the fact that the exemption  
15 that allows injection into the lower basin fill  
16 unit which is the town's drinking water source.

17 JUDGE WARD: But no other permit  
18 terms.

19 MS. PASHKOWSKI: That's correct. I  
20 don't want to take up Mr. Franco's time.

21 JUDGE AVILA: Thank you very much.  
22 We'll give Mr. Franco the 15 minutes.

1 MS. PASHKOWSKI: Thank you.

2 MR. FRANCO: Good afternoon, Your  
3 Honor. As I said earlier my name is George  
4 Franco. I'm here with Ronnie Hawks on behalf of  
5 Southwest Value Partners.

6 And as you know what we are attempting  
7 by way of our petition is to have this Board  
8 review the aquifer exemption to the extent that  
9 it overreaches and creates an extensive area of  
10 aquifer in Florence, in the town of Florence,  
11 that the net result is it sits unregulated under  
12 the Safe Water Drinking Act.

13 JUDGE AVILA: Even if this permit  
14 hadn't been issued wouldn't that be true?

15 MR. FRANCO: I'm sorry, one more time?

16 JUDGE AVILA: Even if this permit had  
17 not been issued at all wouldn't the 1997 aquifer  
18 exemption still exist?

19 MR. FRANCO: I agree.

20 JUDGE LYNCH: Do you agree it's  
21 legally valid and in effect today?

22 MR. FRANCO: I agree with a qualified

1 response to that, Your Honor.

2 I agree that the aquifer exemption by  
3 its terms doesn't have expiration.

4 Whether it's legally valid though I  
5 believe that's a question to be addressed at the  
6 time that that exemption becomes relevant.

7 And it doesn't become relevant until  
8 there's a project.

9 JUDGE LYNCH: Doesn't the Safe  
10 Drinking Water Act say that if you object to an  
11 aquifer exemption you have to file in a court of  
12 appeals within 45 days?

13 MR. FRANCO: Your Honor, I read that.  
14 Frankly it's not clearer to me, being perfectly  
15 candid with you, whether that's the proper venue  
16 for this decision or whether it's this Board.

17 And my understanding and we looked to  
18 find some prior instance where this sort of thing  
19 happened and I couldn't find any so I'm not aware  
20 of any precedent I could cite you that says no,  
21 this is where it belongs.

22 JUDGE LYNCH: There is federal court

1 precedent. Are you aware of any Board decision  
2 adjudicating an aquifer exemption?

3 MR. FRANCO: In that regard, yes. But  
4 in regards to the expansive nature of this  
5 aquifer in comparison to the project that it's  
6 now being used for there wasn't anything like  
7 that that I saw.

8 Now if it's there I apologize but I'm  
9 not prepared to cite that law for you or discuss  
10 it in the context of whether we should be there  
11 or we should be here.

12 JUDGE AVILA: I thought even one of  
13 the examples that you all cited in your brief of  
14 an instance where an EPA region had revisited an  
15 aquifer exemption was in the context of someone  
16 had filed a petition for review and the agency  
17 asked for a remand to revisit the aquifer  
18 exemption.

19 So that suggests quite the opposite of  
20 the process we're in right now, that someone went  
21 to a court of appeals to challenge an aquifer  
22 exemption and that's when the agency -- so it

1 seems like there is precedent.

2 MR. FRANCO: That may have been there,  
3 Your Honor, but the result of that case if I'm  
4 understanding the reference you're making to our  
5 petition, it's my understanding that the reasons  
6 for the ruling in that case were however  
7 consistent with what we're trying to do here.

8 And there's no authority that I'm  
9 aware of that says this Board doesn't have the  
10 authority to address this issue as a permit  
11 condition.

12 JUDGE AVILA: I do think there's Board  
13 precedent that says when there's an avenue of  
14 judicial review available we don't usually --  
15 that's not -- you have to go through that  
16 process, not -- that takes it out of for lack of  
17 a better term the Board's bailiwick, that  
18 something that has a particular avenue for review  
19 you don't bring before the Board. Or that the  
20 Board doesn't have jurisdiction to hear.

21 MR. FRANCO: I don't disagree with  
22 that, Judge. And if this Board decides that they

1 don't have authority to make this decision then  
2 we're going to have to address that on behalf of  
3 our client afterwards.

4 But -- go ahead.

5 JUDGE AVILA: This is probably neither  
6 here nor there because the town as I understand  
7 it participated below in the appellant comment  
8 process and joined the petition here.

9 But I noticed that the comments  
10 submitted were by an entity called Southwest  
11 Value Partners. And the petition is signed by  
12 SWVP-GTISMR, LLC.

13 What's the relationship between those  
14 two entities?

15 MR. FRANCO: Your Honor, Southwest  
16 Value Partners in broad strokes is an investment  
17 group as I understand it. And that's why they  
18 have the interest in the town of Florence with  
19 the development that they are involved in.

20 The signator that you're referring to  
21 is going to be one of the officers under that  
22 designation, but it's the group.

1 JUDGE AVILA: The signator to the  
2 comments would have been one of the officers of  
3 the --

4 MR. FRANCO: I believe so, yes.

5 JUDGE WARD: If I could follow up on  
6 another point that had been made by the town's  
7 counsel.

8 I'm reading the petition at page 35  
9 and I think your argument is that as a matter of  
10 policy and reason the region should have  
11 revisited the aquifer exemption here.

12 I think the town stated there's no  
13 legal requirement that EPA have done so. Do you  
14 agree with that?

15 MR. FRANCO: That there's no legal --  
16 say that again, Your Honor?

17 JUDGE WARD: That there's no  
18 requirement that they do so, but that they should  
19 do so as a matter of policy in this case.

20 MR. FRANCO: If we're talking about a  
21 specific rule or statute that says when asked  
22 they have to do it I agree with that, there

1 isn't.

2 But under the context of whether  
3 they're making clearly erroneous decisions or  
4 using their discretion in the grant of these  
5 exemptions I think that's what then brings this  
6 within purview.

7 And frankly that's why we're here to  
8 talk to you about the decision.

9 JUDGE WARD: So to follow up I think  
10 the other comparison you're making is that the  
11 region decided not to reissue or to transfer the  
12 existing permit, but rather to revoke and then  
13 reissue it. And drawing the comparison that they  
14 did so for changed circumstances as to the  
15 permit, but they didn't as to the aquifer  
16 exemption and that there's an issue there.

17 Reading the regulations as it relates  
18 to the permits I think there's a fairly detailed  
19 list of criteria that the region would consider,  
20 can consider in making the decision whether to  
21 revoke and reissue.

22 I'm unaware of any regulations in the

1 aquifer exemption context. And I just want to  
2 make sure that there wasn't something that you  
3 wanted to point us to that's out there that we  
4 should be considering.

5 MR. FRANCO: Your Honor, the only  
6 authority that I can point you to that I'm aware  
7 of is in reference to -- the criteria in  
8 reference to the permit under the CFRs.  
9 Specifically 146.4 I believe and 146.9.

10 In fact, I need to correct myself.  
11 146.4 specifically says criteria for exempted  
12 aquifers.

13 So that would be one of the places  
14 where you could get guidance for the priorities  
15 that go into deciding the appropriate scope of an  
16 aquifer exemption as well as 146.9.

17 And I would like to address Your Honor  
18 if I may --

19 JUDGE LYNCH: Can I interrupt you  
20 there for a moment.

21 The criteria for exempting aquifers at  
22 146.4 and the factors to be considered in

1 revoking, reissuing, and modifying a permit and  
2 setting permit terms for in this instance class  
3 re-permits, they're very different.

4 Do you acknowledge that? What's the  
5 comparison you're making?

6 MR. FRANCO: I'm not sure I understand  
7 the question, Your Honor. As I read 146.4 it  
8 specifically says criteria for exempted aquifers.  
9 And then it reads an aquifer or a portion thereof  
10 which meets the criteria for an underground  
11 source of drinking water in section 146.3 may be  
12 determined under 144.7 of this chapter to be an  
13 exempted aquifer.

14 JUDGE LYNCH: Right.

15 MR. FRANCO: And then of course it  
16 identifies four classes 1 through 5. We're  
17 talking about a class 3.

18 And then it gives the criteria which  
19 frankly provides the language for basically the  
20 one substantive basis that the response to our  
21 petition advances which is that this is not  
22 currently a source of drinking water and not now

1 or will not in the future serve as a source of  
2 drinking water.

3 JUDGE LYNCH: We're here on a  
4 permitting decision and the criteria in the  
5 regulations for issuing permits, modifying  
6 permits, they're different from the criteria for  
7 exempting aquifers.

8 MR. FRANCO: Yes, Your Honor. There's  
9 no other way that we could think of to challenge  
10 the aquifer exemption that is at issue with that  
11 permit.

12 JUDGE LYNCH: Well, what about the  
13 procedure that you cited in your petition  
14 involving Region 6 where the parties filed a  
15 petition with the 5th Circuit challenging the  
16 aquifer exemption.

17 You cite that in your own brief.

18 MR. FRANCO: I understand, Your Honor,  
19 and without skirting that question I'm going to  
20 have to just admit my problem here.

21 I've come into this representation in  
22 substitution of a former partner so there's a lot

1 of history to the briefing, to this case that I  
2 frankly, I hate to deflect but unless Mr. Hawks  
3 can answer it for us I don't have that history  
4 with the file. So you have my apologies on that.

5 But I would like to address one of the  
6 questions that has come up a couple of times in a  
7 related way. And in fact it was asked of the  
8 attorney for Florence Copper and it was this.

9 Why would -- I think the question was  
10 posed as to why this exemption -- what was the  
11 history with it.

12 And the question to the FCI's attorney  
13 was why it ended up being so expansive, and  
14 whether there was any request for it to be  
15 different.

16 And the answer to that is there was a  
17 request for it to be different. Let me give you  
18 just a little bit of the specific history that's  
19 in our petition.

20 On August 5, 2010 R9 wrote to the --  
21 EPA R9 wrote to FCI and in that letter they  
22 specifically say to them, and they cite

1 conditions that led to the revocation and  
2 reissuance process.

3 And they specifically cited the  
4 residential development that was going on in the  
5 town of Florence. Now remember this is 2010 that  
6 this letter's going out.

7 They specifically cited to the  
8 residential development. They actually say --  
9 identify several new drinking water wells.

10 We're seeing in the response that this  
11 isn't a source of drinking water today and won't  
12 likely be one tomorrow.

13 Well, back in 2010 R9 was  
14 acknowledging it as one of the several new  
15 drinking water wells that were showing up in the  
16 town of Florence.

17 JUDGE LYNCH: And in 2010 this was an  
18 exempted aquifer, correct?

19 MR. FRANCO: Yes. It has been all  
20 along.

21 That letter also cites the inactivity  
22 since 1997, again being written in 2010, and it

1 also cites the substantial lapse in time over the  
2 last 10 years.

3 So what's happening in that letter by  
4 R9 to FCI in response to their original  
5 application was they're telling them there are  
6 changed conditions that are relevant.

7 And you need to go back and consider  
8 those.

9 R9 also wrote to them in that same  
10 letter, and this can be found by the way at  
11 attachment 7 to our petition.

12 And this is quoted from that letter,  
13 that their application needed to be updated to  
14 reflect new information and proposed changes to  
15 the application.

16 As you read further into that letter  
17 it's going to say as part of the application  
18 please provide proposed changes to the aquifer  
19 exemption, or confirm that the boundaries remain  
20 the same.

21 So the reason this all even begins to  
22 happen is because R9 is acknowledging changed

1 conditions and instructing FCI in their new  
2 application because they weren't going to get a  
3 transfer that that needs to be addressed.

4 What then happens? FCI then writes  
5 back and they say to R9 in response, and this is  
6 at attachment 9.

7 They wrote back proposing to quote  
8 "facilitate" this review. And in order to  
9 facilitate the review what they did was they said  
10 well, we're just going to take this in two phases  
11 then.

12 Phase one is going to be the PTF part  
13 of the project, the production test facility that  
14 has a shorter duration and you need to get  
15 results to see what the larger commercial project  
16 is going to be.

17 Phase two will be that larger  
18 commercial scale project.

19 So this is the dialogue that's going  
20 back and forth.

21 FCI then revises their application.  
22 And when they revise their application they

1 submit a new proposal for a new aquifer  
2 exemption, different than the one that remains in  
3 effect because it has no expiration.

4 They submit what's attached to the  
5 petition which basically comes down to the PTF  
6 area plus about a 500-foot radius around it, area  
7 around it for monitoring.

8 JUDGE WARD: If I could just ask a  
9 quick clarifying question.

10 So, in terms of the exhibits you're  
11 referencing the attachments to your petition. So  
12 we're on the same page which attachment are you  
13 referring to?

14 MR. FRANCO: The letter in which the  
15 FCI --

16 JUDGE WARD: I'm sorry, the revisions  
17 -- you said that they submitted a revised  
18 application and a new aquifer proposal.

19 MR. FRANCO: Yes, 23, Your Honor. So  
20 they revise their application. They do what was  
21 asked which is propose a more narrow aquifer  
22 exemption that makes sense with the PTF

1 activities only, and they leave the larger  
2 commercial scale project for another day, to come  
3 back with another application and come back with  
4 another presumably aquifer exemption scope if  
5 that's even going to be relevant in the larger  
6 scale project.

7 These are the very changes that were  
8 requested.

9 But what then happens is in the next  
10 step of the process when the revised application  
11 gets submitted R9 then, and this will be at  
12 attachment 34, in 2014 in response to the revised  
13 application R9 comes back and says you know what.  
14 We want you to reinstate the original aquifer  
15 exemption terms.

16 And that's what ends up happening.  
17 And that's why we're here, because all of a  
18 sudden without explanation that we can find  
19 that's what FCI does.

20 They go back to the same original  
21 aquifer exemption terms that date back to 1997,  
22 date back to a time when there was no population.

1 There was, and if I can show the  
2 Board, the original aquifer exemption Your Honors  
3 -- this is going to be hard to see, but this is  
4 an older map. The quality is not -- that's a  
5 little better.

6 What you're seeing there in the yellow  
7 highlighted area, that's the property that the  
8 original owners of this project back in the  
9 nineties owned. That's how much of Florence they  
10 owned.

11 The red demarcation that you see in  
12 the middle of that, that becomes, and I'll show  
13 you more diagrams in a second that will match  
14 that, that becomes the aquifer exemption that is  
15 too broad for this project.

16 So at the time that this aquifer  
17 exemption was granted there was limited review,  
18 limited comment, limited interest because of the  
19 fact that back then it was Magma that owned this  
20 property.

21 There weren't other residents like Mr.  
22 Johnson to show up and table their objections in

1 the way that there are now.

2 JUDGE WARD: Could I interrupt you  
3 just on that point.

4 So, as I understand it Southwest Value  
5 Partners purchased the property I guess in the  
6 Merrill Ranch area back in December of 2009,  
7 correct? Is that right?

8 MR. FRANCO: Yes.

9 JUDGE WARD: But between then and now  
10 your company did not file a request to revisit  
11 the aquifer exemption.

12 And I'm taking your point that when it  
13 was originally issued not too many people lived  
14 in the area. But you were purchasing the  
15 property with the plans for development.

16 But it is the case that you didn't  
17 seek a revision to the aquifer exemption between  
18 then and now, correct?

19 MR. FRANCO: I'm not sure how to  
20 answer that, Your Honor, because the history is  
21 that there has been litigation, and conversation,  
22 and debate on this permit both at the state and

1 federal level all along for many, many years.

2 JUDGE WARD: But outside the context  
3 of the permit, separately was there any request  
4 to revisit, to revoke, or reopen the aquifer  
5 exemption?

6 MR. FRANCO: I'm not aware that there  
7 was. Pardon me? Just informal as I was  
8 referring to through the dialogue and the years  
9 of communication and hearings and things like  
10 that that have happened both -- mainly at the  
11 state level, frankly.

12 So yes, it has been a contested issue  
13 in that regard. But no filing I think in the way  
14 Your Honor is suggesting.

15 JUDGE WARD: Okay. And then I guess  
16 just another follow-up question. And I  
17 appreciate the walking us through the history of  
18 the submissions and the back and forth.

19 But if you could address what do you  
20 see as the legal significance of that here in  
21 light of the decision made by the region that's  
22 before us.

1 MR. FRANCO: Sure. And let me do that  
2 by just giving you the visual.

3 This area that you see on this  
4 diagram. And as you see it's labeled Merrill  
5 Ranch.

6 This is now a more contemporary  
7 version of that property that I just showed you.  
8 This is dated 2007 if I can read the fuzzy  
9 numbers in the corner.

10 But you go from that area that's  
11 demarcated with the yellow highlighter which is  
12 nothing but desert back then for the most part  
13 and no population basically.

14 And by 2007 it looks like this. These  
15 are all homes. These are all developments.  
16 These are all people that are going to be relying  
17 on this aquifer as a primary source of drinking  
18 water.

19 And we've attached to our petition a  
20 letter from Southwest -- I'm forgetting the name  
21 of the outfit that did the study, but it was  
22 submitted as a basis to argue that this is in

1 fact the primary source of drinking water for  
2 this community.

3 So the circumstances are dramatically  
4 different. Is the exemption a valid document  
5 because it doesn't expire? Sure. But that  
6 doesn't mean that 10, 20, 30 years from now when  
7 someone comes along and needs to then  
8 intentionally invade or put at risk these sources  
9 of drinking water that the scope of that  
10 exemption and the propriety of that exemption  
11 shouldn't be reexamined. It needs to be  
12 reexamined.

13 JUDGE LYNCH: Did you consider the  
14 exempted aquifer when you purchased the property?

15 MR. FRANCO: I don't know the answer  
16 to that, Your Honor. That would be best put to  
17 one of the officers at SWVP.

18 So, it only makes sense that this  
19 aquifer which is now outdated by its terms that  
20 have everything to do with the priorities that I  
21 referenced a minute ago in the CFRs, it only  
22 makes sense that it needs to be revisited when

1 conditions so significantly change.

2 The EPA R9 acknowledged that. They  
3 requested the information. What's inexplicable  
4 here and not in the record is why they eventually  
5 then told FCI after FCI adjusted it to a proper  
6 scope, no, go back and make it the broader  
7 exemption.

8 The only thing we can surmise, and  
9 it's only a speculative thought is that when they  
10 saw this project broken up into two phases to  
11 facilitate their review they may have figured  
12 well, we're headed down the road towards the  
13 commercial project anyway, we'll just leave this  
14 one in place.

15 We don't know. But they're not  
16 telling us. So all we have then is this PTF  
17 activity in a confined space and it's got about  
18 398 acres in excess of the 2 or 3 that they need  
19 and frankly asked for in their petition.

20 JUDGE LYNCH: Other than the extent of  
21 the aquifer exemption do you object to any terms  
22 of the permit?

1 MR. FRANCO: No. And here's why  
2 that's significant Your Honor. And I'm going to  
3 ask you to -- this is the crosscut of the  
4 exemption.

5 The green dotted line represents the  
6 exempted area. The orange in the middle  
7 represents the PTF area where the activity is  
8 going on.

9 There's a buffer not depicted on this  
10 diagram but for purposes of efficiency I'll just  
11 freehand it. It's going to look like this. And  
12 that's the 500 foot buffer that would be part of  
13 the requested exemption by FCI that R9 came back  
14 and said no, we want you to go back and go back  
15 to the big original exemption.

16 What I'd like you to consider because  
17 I do sense that this is kind of a novel  
18 circumstance is this.

19 Imagine for a moment that there's no  
20 BHP, that there is no original permit, no  
21 original aquifer exemption.

22 Imagine for a second that FCI walks in

1 and applies for a proper permit with a proper  
2 exemption for this same PTF project seen in that  
3 orange demarcation.

4 Now imagine that they ask for a 400  
5 acre aquifer exemption that effectively takes all  
6 of that land, all of that water area out of  
7 regulation under the Safe Drinking Water Act.

8 Does anyone here really believe that  
9 that would be granted?

10 JUDGE AVILA: If it were you wouldn't  
11 come to the Board. You would go to a federal  
12 circuit court, right?

13 MR. FRANCO: I don't know, Judge.  
14 Possibly. I don't know the answer to that.

15 JUDGE WARD: To follow up. I think  
16 the concern I'm hearing putting the aquifer  
17 exemption to the side is what you're focused on.

18 The concern is that your planned  
19 development and the wells there will be at risk  
20 of contamination from this, the operations under  
21 this permit.

22 And I think we heard the EPA counsel,

1 well, this is the activity area that's orange.  
2 This is the 500 foot buffer that gives the  
3 ability to monitor and catch any problem.

4 And what we're hearing is that if  
5 anything happens, and I think the word they use  
6 in their papers is we meaning EPA R9 we feel, we  
7 believe that the monitoring systems that FCI has  
8 in place if such an event were to happen are  
9 appropriate and there's not really any real risk.

10 And if anything does get out, if any  
11 contaminant does get out, oh, it's going to take  
12 about 200 years before it reaches a drinking  
13 water well.

14 If those systems that are in place to  
15 monitor and protect against this contamination,  
16 potential contamination are so foolproof that  
17 nothing bad is ever going to happen outside of  
18 here then why do they need all that exemption  
19 area, and why does that area have to exist  
20 exempted in violation of the Safe Drinking Water  
21 Act?

22 And that's where our position is, Your

1 we'll ask them again when they get up in response  
2 to your petition. But they pointed to several  
3 different permit conditions as well as modeling  
4 that had been done that suggested just on the  
5 science that the risk wasn't there.

6 And I don't see, and I think we'd  
7 asked earlier whether you're challenging any of  
8 the particular findings that were supportive of  
9 this permit.

10 So I don't see that being contested  
11 here by you. I just see a concern that the  
12 aquifer exemption stands and it should have been  
13 revisited.

14 Is that a fair reading of your  
15 petition?

16 MR. FRANCO: In parts, Your Honor, and  
17 let me see if I can address what I think the  
18 concern there is.

19 What we are hearing and what's written  
20 in their papers is that -- and I'll just use this  
21 since I've already marked on it -- the basic  
22 response to our petition from them has become

1 Honor, to get to your answer which is by its  
2 existence and without any justification that ties  
3 it to this project, and because it does represent  
4 risk to drinking water wells it's in violation of  
5 the Safe Drinking Water Act.

6 So it's not an answer to say well, if  
7 anything happens nobody's really going to get  
8 hurt. That's great, and we're happy to hear that  
9 the monitoring systems are so good, but the real  
10 issue here is that you've got a condition there  
11 that is right now not being regulated, will not  
12 be regulated, and while it's not being regulated  
13 it's not subject to the prescripts of the act.

14 JUDGE WARD: So just to confirm it  
15 sounds as if your concern -- what I'm hearing you  
16 say is your concern isn't with respect to the PTF  
17 area and the area of review, the 500 foot buffer,  
18 its existence, but rather the fact that nothing  
19 was done with respect to the aquifer exemption  
20 beyond those boundaries.

21 MR. FRANCO: Yes. If I understood you  
22 I'm going to agree.

1 Now, I've just addressed the lateral  
2 portion of the exemption. There's also challenge  
3 to the vertical portion. And I'm going to keep  
4 using this as my visual.

5 What they've also asked for in the  
6 exemption -- am I okay on time, Judge?

7 JUDGE AVILA: You're well over.

8 JUDGE WARD: Let me ask one question  
9 on that. Others may have a question.

10 So on the lower basin fill unit I'm  
11 reading your petition as the argument is it  
12 doesn't contain copper so therefore how could it  
13 be part of the exempted aquifer. Is that?

14 MR. FRANCO: Whose position?

15 JUDGE WARD: Your position. Which  
16 really to me I don't think that there's a  
17 disagreement that it doesn't contain copper, but  
18 rather that there was a decision made in 1997  
19 that it should be part of the aquifer exemption.

20 MR. FRANCO: Right. The vertical  
21 portion of the exemption that we take issue with  
22 is the fact that it's basically between these two

1 blue lines. This is the lower portion here and  
2 they obviously don't go parallel, and that's the  
3 upper portion.

4 In the upper portion there's 200 feet  
5 under the original aquifer exemption parameters  
6 that invade into the bottom part of the lower  
7 basin fill unit which is where the drinking water  
8 supply is.

9 JUDGE AVILA: So your vertical  
10 argument goes to those 200 feet in the LBFU.

11 MR. FRANCO: Yes.

12 JUDGE AVILA: You're well over your  
13 time. Given that we've gone over for everything  
14 why don't we take a 10-minute recess and then  
15 we'll come back and reconvene.

16 MR. FRANCO: Am I still on?

17 JUDGE AVILA: We'll give you your five  
18 minutes of rebuttal.

19 MR. FRANCO: Okay.

20 JUDGE AVILA: We appreciate your  
21 argument.

22 MR. FRANCO: Thank you.

1 JUDGE AVILA: Thank you.

2 (Whereupon, the above-entitled matter  
3 went off the record at 2:50 p.m. and resumed at  
4 3:01 p.m.)

5 JUDGE AVILA: Okay, we'll proceed with  
6 oral argument in UIC Appeal No. 17-03 and we'll  
7 hear from EPA Region 9 now.

8 MR. MINOR: Thank you, Your Honors.  
9 Dustin Minor again.

10 As petitioners concede there is no  
11 legal requirement for Region 9 to revisit the  
12 validly existing extant aquifer exemption.

13 I think it's beyond the Board's  
14 jurisdiction to do so. I think that aquifer  
15 exemptions are reviewable in the circuit courts  
16 as provided under the Safe Drinking Water Act as  
17 final agency action that is separate and distinct  
18 from the permitting process.

19 JUDGE LYNCH: Counsel, how would that  
20 work if petitioner can't challenge the aquifer  
21 exemption in this proceeding? Would they first  
22 have to file a petition with the region or the

1 Administrator at this point?

2 MR. MINOR: At this point, yes. I  
3 think had they wanted to challenge it in 1997  
4 when we had issued it they could have challenged  
5 it within 45 days of that issuance.

6 But if they wanted us to revisit that  
7 decision then I think they would be required to  
8 petition us to make a decision because they would  
9 certainly have missed the 45-day requirement  
10 obviously.

11 JUDGE LYNCH: It would be under the  
12 Administrative Procedures Act?

13 MR. MINOR: Section 1448 of the Safe  
14 Drinking Water Act allows for review of final  
15 agency action within 45 days of that action, or  
16 for changed circumstances. It does note that.

17 JUDGE LYNCH: That would have been in  
18 1997, right.

19 JUDGE AVILA: It's under the APA that  
20 they can petition the agency, the Administrative  
21 Procedures Act and the First Amendment that they  
22 can ask the agency or the region to revisit the

1 aquifer exemption?  
2 MR. MINOR: Potentially the APA and  
3 section 1448 of the Safe Drinking Water Act which  
4 does have a changed circumstances provision in  
5 addition to the 45-day requirement.

6 JUDGE AVILA: But doesn't the changed  
7 circumstance provision just go to the time in  
8 which you file a petition in the court of  
9 appeals?

10 MR. MINOR: You know, I don't think  
11 there's been a lot of petitions under section  
12 1448 that I'm aware of for things like aquifer  
13 exemptions so I'm not certain.

14 JUDGE AVILA: They petition the  
15 agency. They get a response. What happens next?  
16 And they're disappointed by the response.

17 MR. MINOR: I think if they petition  
18 the agency and we deny that petition then I think  
19 they could seek to take that to the 9th Circuit  
20 to review the adequacy of that decision.

21 And I can't speak on behalf of the  
22 Department of Justice as to what exactly the

1 Department of Justice would require to meet the  
2 criteria necessary to do that, but I think that  
3 is the avenue they would explore, and I think  
4 that is analogous to the path that has been taken  
5 in other petitions, the Golead petition I think  
6 you all were referring to earlier that they cite  
7 in their papers as well as Western Nebraska  
8 Resources Council in Region 8 where the 8th  
9 Circuit has looked at the adequacy of aquifer  
10 petitions done by the agency.

11 And so I think that is the proper  
12 venue.

13 JUDGE AVILA: Can I just ask you  
14 another 50,000 foot level question that kind of  
15 circles back to something we talked about  
16 earlier.

17 Do you have the permit in front of  
18 you?

19 MR. MINOR: I do. I brought it and I  
20 brought the response to comments this time as  
21 well.

22 JUDGE AVILA: So page 8 to 9, I'm just

1 trying to understand the lateral aquifer -- well  
2 first of all, 2-B-2 says the permit shall ensure  
3 that there's no migration of injection fluids  
4 processed by products or formation fluids beyond  
5 the exempted zone, right.

6 And then (b)(1) is the exempted zone.  
7 And it cites figure S-1 in the in situ copper  
8 recovery area delineated in figure S-1.

9 I don't see anything delineated the  
10 ISCR in figure S-1. So I'm trying to understand  
11 what is the lateral extent of the exempted zone  
12 in the permit.

13 MR. MINOR: I'm trying to put this up.  
14 Maybe I can answer your question without doing  
15 so.

16 But the exempted zone --

17 JUDGE WARD: We're going to see if we  
18 can give you some assistance.

19 MR. MINOR: Okay. Thank you. I  
20 acknowledge that this permit provision is not as  
21 clear as it could be. So just to explain I'll  
22 zoom back out first this figure which I think is

1 similar to a figure that was illustrated earlier.

2 So, the PTF well fill is the small  
3 circle here in the middle and that's the area of  
4 review around it.

5 The green line just for reference is  
6 the state mineral lease, and the orange line is  
7 the full extent of the aquifer exemption.

8 So the no migration requirements in  
9 the permit actually do apply to the exempt area.  
10 I think that may have been a question you'd asked  
11 before, Judge Lynch.

12 So it wouldn't violate 2-B-2 and 2-B-3  
13 unless it migrated beyond the exempt zone. But  
14 the substantive provisions in the permit that  
15 require hydraulic control and all the monitoring  
16 wells and all the protections are actually within  
17 the area of review.

18 So that is one slight disconnect  
19 between the aquifer exemption delineation and the  
20 permit.

21 JUDGE WARD: So the exempted zone  
22 referred to in 2-B-2 of the permit on page 9,

1 that is the orange line.  
 2 MR. MINOR: Yes.  
 3 JUDGE WARD: So one of the arguments  
 4 I think the town's counsel made was that we're  
 5 challenging a permit term. And the aquifer  
 6 exemption has been incorporated into the permit.  
 7 And therefore that's something that we can  
 8 challenge. How do you answer that?  
 9 MR. MINOR: Well, I think because the  
 10 Safe Drinking Water Act has sort of a requirement  
 11 -- has a requirement to not exempt into USDWs  
 12 which are then able to be exempted. So the  
 13 definition of a USDW, an underground source of  
 14 drinking water does not include an exempt  
 15 aquifer.  
 16 So for us to issue this permit we have  
 17 to determine that it is occurring into an exempt  
 18 aquifer because otherwise it would be a USDW.  
 19 So I think even though it's listed  
 20 under the permit the actual description of the  
 21 aquifer exemption is really just a recitation of  
 22 the lateral and vertical extent of the area that

1 is not a USDW to which the prohibitions in the  
 2 Safe Drinking Water Act apply.  
 3 So the no migration into or between  
 4 USDWs in 2-B-2 and the adequate protection of  
 5 USDWs in 2-B-3 it's necessary to define what are  
 6 the underground sources of drinking water by  
 7 referencing the aquifer exemption.  
 8 But by merely referencing its  
 9 boundaries I don't believe it brings it before  
 10 the Board as a permit condition.  
 11 For example, in primacy states there  
 12 may be numerous permits covering particularly in  
 13 the oil and gas area the same exempt aquifer.  
 14 And the region doesn't even issue the permit in  
 15 those states like they do in Arizona. But we  
 16 have a requirement to approve the aquifer  
 17 exemption.  
 18 So they're really distinct regulatory  
 19 requirements that are independent but they're  
 20 related in the sense that in order to issue this  
 21 permit it must be into an exempt aquifer and  
 22 that's what's being highlighted in this section.

1 JUDGE AVILA: So are you saying that  
 2 the delineation of the aquifer exemption within  
 3 the permit is akin to if you were injecting into  
 4 a for lack of a better term cavern that was  
 5 underground you might similarly delineate the  
 6 lateral and vertical extent of that cavern and  
 7 say you cannot migrate beyond those dimensions.  
 8 MR. MINOR: Exactly.  
 9 JUDGE LYNCH: So counsel, in terms of  
 10 the abundance of caution assessment you did what  
 11 legal relevance, if any, does that have in terms  
 12 of this permit and our review of the permit?  
 13 MR. MINOR: Well, I think we did it  
 14 voluntarily in response to the comments and the  
 15 concerns that were raised by the petitioners and  
 16 the town and acknowledging the change in  
 17 circumstances.  
 18 I think the biggest import that it has  
 19 is that to the extent the Board would consider  
 20 looking at whether or not the agency looked at  
 21 the area covered by the PTF and whether it  
 22 continues to meet the aquifer exemption

1 requirements we voluntarily did so here.  
 2 We looked at the area covered by the  
 3 exemption and determined that it -- I'm sorry, by  
 4 the permit and determined that it's not a current  
 5 source of drinking water and that it is mineral  
 6 producing.  
 7 And therefore there wouldn't be  
 8 anything to remand. But I don't think we by  
 9 doing that voluntary review gave the Board  
 10 authority to review something that only has  
 11 jurisdiction in the circuit court.  
 12 JUDGE LYNCH: Thank you. So, if when  
 13 doing that voluntary review you saw something  
 14 that caused you to want to revisit the aquifer  
 15 exemption what process would you have undertaken?  
 16 MR. MINOR: Well, I think because this  
 17 was an application for a permit and we were  
 18 looking at that.  
 19 If we determined that the permit was  
 20 going to be exempt causing injection and recovery  
 21 in an area that shouldn't have an aquifer  
 22 exemption we might consider the validity of

1 issuing that permit. And that would be the  
2 McMillan that we looked at.

3 And here they do not make any  
4 arguments that this permit will result in a lack  
5 of protection. It's really the town and the  
6 Southwest Value Partners are really I think  
7 attempting to preempt a commercial scale mine at  
8 the site.

9 Because they're not citing to the  
10 concerns about the PTF that it may have on the  
11 town's drinking water. They're really asking  
12 that we conform the aquifer exemption to the PTF  
13 and that wouldn't change the substantive  
14 provisions of the permit, but it would change --

15 JUDGE WARD: If I could interject  
16 there, I think they're arguing that the LBFU,  
17 lower basin fill unit, should be part of the  
18 aquifer exemption. And if that were removed  
19 couldn't that possibly have an impact on the  
20 permit terms here?

21 MR. MINOR: Yes, it could. That is  
22 correct. So I think if you conform the aquifer

1 exemption just to the permit it wouldn't have a  
2 difference.

3 But if you first change the aquifer  
4 exemption as they're also requesting vertically  
5 to exclude the lower 200 feet of the LBFU it  
6 would require changes to the permit.

7 JUDGE WARD: And if you were going to  
8 change the aquifer exemption either as a result  
9 of your voluntary review or a petition would that  
10 be a separate process that the region would  
11 undertake?

12 MR. MINOR: Yes. We would ask  
13 Florence Copper to submit their justification for  
14 that aquifer exemption modification. We would  
15 look at the record for that and normally we put  
16 aquifer exemptions out for public comment and  
17 allow parties to comment on the modifications.

18 And if we made a decision to change it  
19 based upon an adequate record and they weren't  
20 okay with that there would be the opportunity to  
21 petition to challenge that in the 9th Circuit.

22 JUDGE AVILA: Can I just -- I think

1 you said it today and you said it in your brief.  
2 The voluntary analysis within the PTF. I think  
3 you said you did it in response to comments, but  
4 it's in the statement of basis for the draft  
5 permit.

6 So what comments were you doing it in  
7 response to?

8 MR. MINOR: Well, I think as the town  
9 has pointed out in their discussion today we were  
10 aware of and involved in discussions with the  
11 town and Southwest Value Partners throughout this  
12 process as well.

13 And so we had heard concerns expressed  
14 about the change in circumstances.

15 And really what we chose to do was  
16 bifurcate the process as they said into a two-  
17 part process.

18 One is to make sure that you can have  
19 a safe and Safe Drinking Water Act compliant mine  
20 here and require a production test facility for  
21 that.

22 And then if that is successful the

1 whole point of what Florence Copper is doing is  
2 not to get whatever copper they get out of this  
3 production test facility.

4 If that is successful they will seek  
5 a commercial scale permit to operate a commercial  
6 scale mine.

7 And that permit is not before EPA and  
8 is not before the Board. And that alone also  
9 would not require a revision of the aquifer  
10 exemption.

11 But I think the voluntary look that we  
12 did here for purposes of the PTF was limited to  
13 the impacts that could occur from the production  
14 test facility.

15 And we thought it really wasn't right  
16 to look at the potential impacts of a permit that  
17 we don't know what the scale will be.

18 They continue to have ongoing  
19 litigation about whether or not there can be  
20 mining on Florence Copper's property outside of  
21 the state mineral lease area.

22 And it just seems that it would be a

1 much more informed decision by the agency if we  
2 were to look at the aquifer exemption again, if  
3 we were to choose to do so as part of a  
4 commercial scale to know what the commercial  
5 scale operation that was being proposed and where  
6 it was at.

7 JUDGE WARD: And what's your response  
8 to the argument that Southwest Value Partners  
9 made. I think the town might have raised this as  
10 well in her comments, that the region decided  
11 that they wouldn't simply transfer the permit,  
12 that they would revoke and reissue because of  
13 changed circumstances, but didn't apply those  
14 same changed circumstances as it related to the  
15 aquifer exemption.

16 How do you respond to that point?

17 MR. MINOR: Well, I think the decision  
18 the region made was that there is a valid  
19 existing aquifer exemption in place that's been  
20 in place for the last 20 years. And it made  
21 sense to rely on that for the PTF.

22 But before they want to propose a

1 commercial scale permit we wanted to make sure it  
2 could be done in a safe and effective manner  
3 compliant with the Safe Drinking Water Act.

4 And so we achieved the same goals of  
5 making sure that copper mine done there, if any,  
6 is done in compliance with the Safe Drinking  
7 Water Act and the regulations by bifurcating the  
8 permit process.

9 Aquifer exemptions are just a  
10 classification. It doesn't require anything.  
11 All of the substantive provisions are contained  
12 in the permit.

13 And it wouldn't change the production  
14 test facility and how it's done to demonstrate  
15 whether or not it's feasible to do a commercial  
16 scale facility. So we really felt it was better  
17 to defer the aquifer exemption determination  
18 until we knew if and what the commercial scale --  
19 if it was going to go forward with the commercial  
20 scale and if so what the scale of that might be.

21 But we didn't feel it was necessary to  
22 revise the aquifer exemption to require a new

1 one, to really require potentially three changes.  
2 The original aquifer exemption, then  
3 a modification, and then a new aquifer exemption  
4 would have then had to have been required for a  
5 commercial scale.

6 This is not consistent with how it's  
7 done. There's over 4,000 aquifer exemptions  
8 throughout the country and how it's done in other  
9 states. That was the decision the region made.

10 JUDGE AVILA: Do you know or is my  
11 recollection correct that when the agency  
12 promulgated the aquifer exemption regulations at  
13 some point didn't it consider whether to have an  
14 expiration period and opted not to do that? Is  
15 my recollection right on that or am I wrong?

16 MR. MINOR: I believe there was  
17 definitely some consideration of that, and there  
18 may be some older documents that talk about that.  
19 I could look into that and provide supplemental  
20 briefing if you want. But I don't recall  
21 specifically.

22 JUDGE AVILA: In any event it's not in

1 the regs.

2 MR. MINOR: It is not. And I think  
3 it's not in the regs for a reason. I think when  
4 you go out and perform and there's other types of  
5 mining in situ actions, injection that occur as  
6 well.

7 But basically what an aquifer  
8 exemption does is remove the protections of the  
9 Safe Drinking Water Act for that area of the  
10 aquifer.

11 And in a mining situation it allows  
12 that to occur. And what you're really doing is  
13 pulling that aside.

14 And even though there are strict  
15 requirements to restore that area that  
16 restoration isn't for the benefit of the exempt  
17 aquifer, it's because it's the acknowledgment as  
18 we discussed earlier that the contaminants or  
19 injectate does migrate post mining.

20 And so you have to have restoration of  
21 the area within the injection and recovery zone  
22 to protect the non-exempt portion of the

1 aquifer's down gradient.  
 2 I'm not sure if I answered your  
 3 question.  
 4 JUDGE AVILA: Just harkening back to  
 5 something we talked about earlier an area of  
 6 review, and again this is kind of a 50,000 foot  
 7 level question, I get it has a lateral boundary  
 8 and here it's a 500 foot radius outside the well  
 9 field.  
 10 Is there a vertical boundary to the  
 11 area of review, or is it just a big cylinder that  
 12 goes all the way down from the surface down to  
 13 the -- so what I'm trying to get at I think  
 14 earlier you said the permit is designed not to  
 15 have any vertical excursions. Is that part of  
 16 the area review analysis, or is it part of just  
 17 are we keeping USDWs safe?  
 18 MR. MINOR: Well, I think vertically  
 19 the USDW is the LBFU above 200 feet. So I think  
 20 the area of review is the area that's potentially  
 21 going to have a zone of endangering influence  
 22 impacts from the injectate -- injection and

1 recovery.  
 2 And so if there were a problem and  
 3 there were an excursion that isn't expected, but  
 4 if it were to occur what area would that occur  
 5 in.  
 6 And that's why we have monitoring in  
 7 the different zones because there would be the  
 8 concern if there was a lateral loss of hydraulic  
 9 control that that could migrate vertically.  
 10 That was why the wells were installed  
 11 at the interface between the LBFU and the oxide  
 12 zone to detect any vertical migrations up.  
 13 It's really not just because of the  
 14 area of review, but it's because of the  
 15 requirement to protect the USDWs above.  
 16 But you are I guess vertically still  
 17 looking within that zone because you wouldn't  
 18 expect the injectate to get beyond that zone so  
 19 it wouldn't migrate up.  
 20 And I don't think anyone's expressing  
 21 concerns about given the depth of the ore body  
 22 and where this is occurring any migration down

1 below.  
 2 JUDGE AVILA: Thank you very much.  
 3 We'll hear from Florence Copper.  
 4 MR. TSIOLIS: Thank you, Your Honors.  
 5 George Tsiolis again.  
 6 The point was raised or the question  
 7 was raised whether or not the exemption is  
 8 incorporated into the permit.  
 9 I don't know whether I would use the  
 10 term incorporated. Certainly every single  
 11 exemption has to be taken into account when  
 12 there's a permit associated with that exemption.  
 13 There's a requirement in the  
 14 regulations that states that the permit -- the  
 15 regulations are at 144.52 and 144.3.  
 16 JUDGE AVILA: I'm sorry, could you say  
 17 those again?  
 18 MR. TSIOLIS: 144.52(A)(3) and (A)(9)  
 19 which require all UIC permits to include  
 20 provisions to ensure injected fluids do not  
 21 migrate and formation fluids are not displaced in  
 22 any USDW.

1 I think the number is closer to 5,000  
 2 exemptions based off of the EPA website that is  
 3 cited in footnote 4 of our response brief.  
 4 And every one of those permits that is  
 5 associated with those 5,000 exemptions has to  
 6 have that basic addition in it and it makes sense  
 7 that they do.  
 8 All those permits that are associated  
 9 with such exemptions either go through  
 10 modification or revocation and reissuance on a  
 11 regular basis.  
 12 As activities are added, as additional  
 13 wells are installed, as changes are made there's  
 14 a choice between either a modification or a  
 15 revocation and reissuance.  
 16 And the criteria for deciding which  
 17 one will occur is at 144.38 and 144.39.  
 18 If there are significant changes to  
 19 the activity that would be conducted in relation  
 20 to the exemption zone at some point it just  
 21 becomes unworkable to do a modification and it's  
 22 easier to revoke and reissue the permits.

1 The question of whether the Board has  
2 jurisdiction to revisit a 20-year-old exemption  
3 is a question that applies not just to this  
4 proceeding but to all of those permits that are  
5 associated with those 5,000 exemptions.

6 And those permittees are not in this  
7 room. And we would caution the Board aside from  
8 the fact that the rules don't speak to revocation  
9 of an exemption, they only speak to granting an  
10 exemption.

11 Indeed, the perfect place for  
12 inserting a requirement during a modification or  
13 revocation and reissuance to revisit the  
14 exemption that is associated with the permit, the  
15 perfect place to place that would be in 144.38  
16 and 144.39, in a rulemaking where all 5,000  
17 exemption stakeholders can participate in a  
18 notice and comment proceeding.

19 So there is a policy reason in  
20 addition to the rules being silent on the  
21 question for why the Board should be careful  
22 about saying -- concluding that it has

1 jurisdiction to consider an aquifer exemption or  
2 reconsider an aquifer exemption, essentially  
3 reopen it in the context of a permit modification  
4 or revocation and reissuance.

5 JUDGE AVILA: How far do you take that  
6 argument? Could the towns come in to the EPA  
7 Administrator or the region and petition for a  
8 revisiting of the aquifer exemption?

9 MR. TSIOLIS: No. We take the  
10 position that once an exemption is issued it  
11 cannot be revoked or reduced.

12 And there's a good reason for that.  
13 It's grounded in regulatory construction. If  
14 Your Honors look at 146.4(b). 146.4(b) is one of  
15 the criteria that needs to be satisfied for  
16 deciding whether or not an exemption shall lie.

17 And it states that the portion of the  
18 aquifer that is being considered for exemption  
19 cannot now and will not in the future serve as a  
20 source of drinking water because it contains  
21 minerals in commercially producible quantities.

22 What does that mean? If you're in

1 1997 and you're making the decision to exempt an  
2 aquifer, and you see that it's got -- and you  
3 conclude and it's in the record that it has  
4 commercially producible minerals both in the  
5 oxide zone and in the lower basin fill unit to  
6 200 feet you then are faced with the rule that  
7 says will not serve in the future as a source of  
8 drinking water.

9 If we allow, if we being the Board or  
10 the EPA I should say, if the EPA allows a future  
11 well to come to the nuisance, Your Honor,  
12 essentially, a future well to be placed and  
13 defeat this clause in the rule then it makes that  
14 rule mere surplusage.

15 And there's a reason why that rule is  
16 there that says if it's got commercially  
17 producible minerals in the eyes of the EPA that  
18 determination has been made and it's a technical  
19 determination that was made in '97 and it's  
20 entitled to deference.

21 If that determination is made then  
22 we're going to deem that this water in the future

1 will not be used as a source of drinking water.

2 And there's a good reason for that.  
3 And there's a reason also for construing that  
4 rule that way that's grounded in avoiding  
5 Constitutional issues.

6 The Safe Drinking Water Act grants to  
7 the states the decision-making about how to  
8 prioritize among competing types of uses of their  
9 groundwater.

10 The Safe Drinking Water Act, no  
11 federal law invades the prerogative of the  
12 states, of the various states, especially in the  
13 Southwest, the arid southwestern states to decide  
14 among, okay, we're going to have certain portions  
15 of the aquifer be available for use for  
16 commercial mineral production, certain portions  
17 of the aquifer be available for use as a drinking  
18 water source for residential developments.

19 In this case and generally whenever a  
20 right to use a portion of an aquifer for  
21 commercial mineral production is at issue it  
22 arises only because the State of Arizona

1 Department of Water Resources grants a permit.  
2 And that permit is a vested right that  
3 Florence Copper acquired from BHP. That vested  
4 right predates any zoning ordinances that were  
5 adopted post hoc by the town of Florence in an  
6 attempt to preclude and frustrate Asarco's  
7 rights.

8 And if this rule were to be  
9 interpreted in a way that it has a running  
10 revisiting, that the exemption can be revisited  
11 whenever somebody decides they want to have a  
12 competing use of that water for drinking water  
13 purposes it would invade the prerogative of the  
14 states to decide among different types of usage  
15 of groundwater.

16 The same approach is taken in Wyoming.  
17 The same approach is taken in Texas.

18 There's a rule of construction that  
19 says, and the case law is -- they're both Supreme  
20 Court cases, 472 US at 680, and 562 US at 204,  
21 there's a rule of construction that says if  
22 you've got more than one plausible interpretation

1 of a regulation in addition to -- it applies to  
2 both regulations and statutes you choose the one  
3 that avoids the Constitutional problem.

4 And certainly Florence Copper has  
5 invested significant resources in reliance on the  
6 exemption. So the two issues that would be  
7 raised under the Constitution would be not only  
8 the Taking Clause of the Fifth Amendment but also  
9 federalism under the Tenth Amendment.

10 You avoid all that by holding that an  
11 exemption once it is issued and at least relied  
12 upon -- just once it is issued, but at least one  
13 that is relied upon to the extent it has been  
14 cannot be revoked and cannot be reduced.

15 I'm just telegraphing what Florence  
16 Copper's position would be if Region 9 is ever  
17 faced with a petition aside from this permit  
18 proceeding.

19 As far as this Board is concerned it  
20 doesn't have to decide these issues. This Board  
21 is faced with purely a jurisdictional question.

22 Do the rules grant the Board

1 jurisdiction in the context of a permit  
2 proceeding to revoke an exemption or remand for  
3 consideration of the scope of the exemption, the  
4 size of the exemption.

5 And the rule are silent on that. And  
6 again there's the policy question that all  
7 permits associated with the 5,000 exemptions that  
8 are out there are subject to the requirement to  
9 have the basic provision that they prevent  
10 injectate and displacement fluids from migrating  
11 outside the boundaries of the exemption.

12 So they are all in the same boat and  
13 would be affected by a remand in this case.

14 JUDGE AVILA: Nothing further?

15 MR. TSIOLIS: I might correct one  
16 thing if I may move from the jurisdiction issue  
17 to correct some statements that were made by the  
18 town of Florence. I'm sure they'll rebut in  
19 kind.

20 But there's been statements made in  
21 the petition and I think also during the oral  
22 argument that this water is the only source of

1 water that they have.

2 I just point a reality out and that is  
3 that the town of Florence gets surface water from  
4 the Central Arizona Project to the tune of 2,000  
5 acre feet a year.

6 And what do they do with that water?  
7 They inject it into the ground and under  
8 Arizona's law they get credits and they sell  
9 those credits to a third party.

10 And then they turn around and say that  
11 oh no, this is going to imperil our precious  
12 drinking water supplies.

13 They also make a statement in their  
14 petition at page 16 that their total water need  
15 through 2025 is 33,000 acre feet a year.

16 That is not what they told the Arizona  
17 Department of Water Resources when they applied  
18 for a designation of assured water supply to  
19 operate as a municipal water provider.

20 They told the State of Arizona that  
21 that's half that amount.

22 So there's been a lot of -- I won't

1 say hysteria, but exaggeration about the effect  
2 of the importance of water to the town of  
3 Florence.

4 But they certainly have other sources  
5 available to them. And in the meantime the State  
6 of Arizona has decided that this portion of the  
7 aquifer, Florence Copper has a permitted right to  
8 use it for mineral extraction and under Arizona  
9 law once you have that permitted right the State  
10 of Arizona does not grant permit rights to  
11 withdraw water that will interfere with that  
12 right.

13 JUDGE WARD: Could I ask a question  
14 about something that the town and Southwest Value  
15 Partners raised in their petition? It's at page  
16 25.

17 And they reference the Arizona  
18 Department of Environmental Quality's permit  
19 which they're describing as prohibiting Florence  
20 Copper from allowing any contaminants into the  
21 lower basin fill unit.

22 And so how does that -- I'm just

1 interested in hearing from you does that  
2 constrain what you can do in terms of operations  
3 at this site?

4 MR. TSIOLIS: Yes, Your Honor. This  
5 kind of is related to the question that was asked  
6 earlier about why did Florence Copper apply for a  
7 smaller zone to begin with.

8 My colleague Rita Maguire educated me  
9 on the reason for that so I'll answer that and  
10 then I'll answer your question, Your Honor.

11 And that is because under the aquifer  
12 protection permits the ADQ is only allowing as  
13 Your Honor stated what's called the process  
14 management area to be up to the limits of the  
15 oxide zone and not include the lower basin fill  
16 unit.

17 So Florence Copper, the staff who  
18 applied for the permit modification and  
19 ultimately for the permit revocation and  
20 reissuance thought that it would be appropriate  
21 to be consistent.

22 Whether that thinking process informs

1 properly the Board's consideration of whether  
2 it's got jurisdiction to consider the exemption  
3 as part of a permit proceeding I think the answer  
4 is no. But I think that answers the question and  
5 I apologize for not knowing the answer earlier.

6 But the APP serves a completely  
7 different purpose. The APP's purpose is to  
8 prevent a violation of Arizona's aquifer water  
9 quality standards.

10 And the ADQ in its wisdom decided that  
11 it would be inappropriate for injectates to  
12 migrate out of the oxide zone into the LBFU.

13 That was their decision. It was their  
14 technical decision based on policy reasons that  
15 I'm not privy to. I don't know why, but that's  
16 what they decided.

17 What happens under this permit is you  
18 have the 200 feet above the oxide zone, the 200  
19 feet at the lower basin fill unit being part of  
20 the cone of depression that happens when you  
21 withdraw water from within the oxide zone.

22 So that cone of depression aside from

1 the fact that the EPA, that Region 9 did, Your  
2 Honor, find that the LBFU has mineralization  
3 capable of production in commercial quantities  
4 and I'll cite that. It's the response to comment  
5 17 says the LBFU and the highly fractured ore  
6 body are directly connected hydrologically.

7 A commercially producible quantity of  
8 copper is present within the aquifer that is  
9 comprised of both the ore body and portions of  
10 the LBFU. And they cite in support for that  
11 statement to the 1997 record.

12 That decision was made 20 years old.  
13 It's entitled to technical deference.

14 But the reality is aside from that  
15 finding that was made in 1997 is that you have  
16 this cone of depression by withdrawing water from  
17 the oxide zone that reaches into the LBFU.

18 And you need to include for that  
19 reason as well that portion of the LBFU within  
20 the exempted zone because if you don't do that  
21 and somebody else then comes and puts a well in  
22 that includes that portion that would be within

1 the cone of depression within their drawdown then  
2 you have -- you sacrifice the ability of full  
3 scale commercial production in the future in the  
4 pilot test that's leading now to establish that  
5 110 percent control where they're withdrawing 10  
6 percent more than they're injecting.

7 I don't think it should be lost on  
8 everybody here that this is a pilot test project.  
9 Region 9 in its wisdom and I think they made the  
10 right call decided not to go the way of BFP.

11 BFP was going to proceed based solely  
12 on modeling directly to -- or predominantly on  
13 modeling directly to commercial production.

14 Region 9 in its correct wisdom  
15 decided, you know what? The next step is to  
16 gather empirical data so by the time of  
17 commercial production permitting we know best how  
18 to optimize the conditions for control and  
19 capture, and the prevention of migration of  
20 fluids, of injectate and displacement fluids into  
21 the non-exempt zone.

22 JUDGE AVILA: Thank you very much.

1 Mr. Franco, we'll give you your five minutes of  
2 rebuttal.

3 MR. FRANCO: I'm going to try to go in  
4 clip fashion through the points that were raised.  
5 First by the counsel for R9.

6 Let me begin with judicial review.  
7 And the point I'd like to make there Your Honors  
8 is the following.

9 Clearly the Board is concerned whether  
10 or not this is the right place for this matter.  
11 I'm going to read to the Board Title 42 at 300J-7  
12 judicial review sub B.

13 District court's petition for review  
14 actions respecting variances or exemptions.  
15 Filing period, grounds rising after expiration of  
16 filing period, excessiveness of remedy. That's  
17 the title. And here's the provision.

18 The U.S. district courts shall have  
19 jurisdiction of actions brought to review, number  
20 one, the granting of or the refusing to grant a  
21 variance or exemption under Section 300G-4 or  
22 300G-5. 300G-5 Your Honors is the one that

1 pertains to exemptions.

2 Of this title, or secondly, the  
3 requirements of any schedule prescribed for a  
4 variance or exemption under such section or the  
5 failure to prescribe such a schedule.

6 Such an action may only be brought  
7 upon a petition for review filed within the court  
8 within the 45-day period beginning on the date  
9 the action sought to be reviewed is taken.

10 And then it continues. Here's the  
11 problem. And we heard it from counsel in  
12 response to the question of the Board confirming  
13 that the date that action was taken would have  
14 been 1997 when this aquifer exemption was  
15 authorized.

16 None of these folks were around in  
17 1997. Not the population that lives there, not  
18 the town, not the investors, not the developers.  
19 There was no way for that action under this  
20 provision to take us to district court to be done  
21 within 45 days.

22 Which creates a problem when you've

1 got an exemption that has no expiration. Is that  
2 legally valid? Absolutely.

3 But does that mean that it exists  
4 forever without modification? It can't possibly  
5 because of the changed conditions that have to be  
6 evaluated as time passes. That's number one.

7 As to permit condition there's a  
8 strong argument being made that this is an  
9 aquifer exemption. It stands alone. It's not  
10 part of -- it's not a permit condition for  
11 determination by this Board.

12 The permit itself at two sections.  
13 Part 2 entitled specific permit conditions.  
14 That's the title. And that title appears not  
15 just in the original 1997 permit but in the final  
16 permit that was granted to FCI subsequently. So  
17 it's the exact same designation that says part 2  
18 specific permit conditions. And then it provides  
19 two sections of discussion.

20 (A) the area permit. And we've talked  
21 about the different areas involved in this.

22 But at sub (b) it specifically says

1 the aquifer exemption. Then it gives the  
2 parameters for the exempted zone both in lateral  
3 and vertical dimensions.

4 JUDGE WARD: If I could just jump in  
5 there.

6 MR. FRANCO: Yes, Your Honor.

7 JUDGE WARD: I think reading page 8 it  
8 says -- it starts with EPA approved an aquifer  
9 exemption in May of 1997. And I think the  
10 region's response was we're referring to a prior  
11 act that was taken to define the terms of this  
12 permit which is different in their view from the  
13 aquifer exemption somehow being reissued or  
14 incorporated into this permit.

15 So in response I think to the earlier  
16 argument that this was -- the aquifer exemption  
17 has somehow become a term of the permit.

18 So their response is it's not, it's  
19 simply being referred to to define the  
20 prohibitions in this permit. How do you answer  
21 that?

22 MR. FRANCO: Well, then you go to the

1 other section that's within the permit at part 3  
2 which says general permit conditions. Under sub  
3 (a) it says effective permit.

4 And if you read there it says the  
5 permittee is allowed to engage in underground  
6 injection well construction in accordance with  
7 the conditions of this permit.

8 The conditions of this permit include  
9 what have to be accepted under part 2 as specific  
10 permit conditions.

11 And if you go under that which is  
12 where we just were that's the aquifer exemption  
13 and its parameters laterally and vertically.

14 You can't have this permit without an  
15 exemption.

16 JUDGE AVILA: Could the permit have  
17 just said no migration to an underground source  
18 of drinking water?

19 MR. FRANCO: Could the permit have  
20 just said that?

21 JUDGE AVILA: Yes. And not had the  
22 aquifer exemption appended to it.

1 MR. FRANCO: I suppose it could, Your  
2 Honor.

3 JUDGE AVILA: So, why is the fact that  
4 -- why not just read 2-B-1 and 2 to be saying  
5 don't impact an underground source of drinking  
6 water. And by the way we happen to know the  
7 boundaries of where that is.

8 MR. FRANCO: Because that's not what  
9 this does. And there are regulations under the  
10 CFRs that govern the requirements for exemptions.

11 So to just say don't inject vertically  
12 and that takes care of it, that doesn't solve the  
13 problem.

14 The question here and what's being  
15 argued is that coming here with a challenge to  
16 the aquifer exemption is not a quote "permit  
17 condition" that's appropriately before this  
18 Board.

19 And our position is of course it is.  
20 It has to be. The permit itself calls it a  
21 condition of the permit.

22 JUDGE AVILA: I guess I go back to my

1 earlier point. Even if we were to say that  
2 permit condition we said goes away, that we were  
3 to remand it, the 1997 aquifer exemption on its  
4 face has no expiration date so it continues to  
5 exist as a matter of law.

6 So what practically happens? I mean,  
7 there's still no discharge to an underground  
8 source of drinking water.

9 MR. FRANCO: Oh absolutely, Your  
10 Honor, and if nothing happens, nothing happens.

11 But the point is and how we have  
12 crafted our position I think pretty clearly is  
13 that even if nothing happens what that exemption  
14 effectively has done and it's in their own words,  
15 it has taken that area out of the protections of  
16 the Safe Drinking Water Act.

17 And the Safe Drinking Water Act is  
18 very clear, I don't need to recite it to Your  
19 Honors, but it's got very strong language under  
20 the EPA's own website as to how stringent the  
21 requirement that these bodies of drinking water  
22 be regulated.

1 JUDGE AVILA: I guess what I'm saying  
2 is even if we get rid of -- if you got rid of the  
3 two permit terms you identified the 1997 aquifer  
4 exemption would still exist. Right? In the real  
5 world.

6 MR. FRANCO: Yes, as a document.

7 JUDGE AVILA: And so it still would  
8 not be a protected underground source of drinking  
9 water under the Safe Drinking Water Act because  
10 it's an exempted aquifer.

11 MR. FRANCO: I'm not sure I understand  
12 that but I don't think I agree with it either.

13 JUDGE AVILA: I guess you don't, but  
14 that's all right.

15 JUDGE WARD: Could I follow up on that  
16 line of thinking because I think in that same  
17 condition 2-B on page 9 there's a proviso that --  
18 this is paragraph 2.

19 MR. FRANCO: I'm sorry, Your Honor?

20 JUDGE WARD: Paragraph 3. This is B-  
21 3.

22 MR. FRANCO: Are you in our petition?

1 JUDGE WARD: No, on the permit. I'm  
2 sorry if I misspoke.

3 MR. FRANCO: Oh, you're in the permit.

4 JUDGE WARD: At page 9-B-3. And it  
5 talks about needing to restore -- permittee shall  
6 adequately protect underground sources of  
7 drinking water by commencing -- and I'm just  
8 paraphrasing a little bit here -- restoration of  
9 groundwater to primary maximum contaminant levels  
10 under 40 CFR Part 141.

11 So there's an incorporation or a  
12 reference to a preexisting set of regulations  
13 that set certain standards.

14 If you take your argument to its  
15 logical conclusion the inclusion of that term  
16 here opens the door to a challenge of those  
17 regulations before the Board. That seems to go  
18 too far.

19 And it's not unusual for permits to  
20 refer to existing regulations or to be issued  
21 pursuant to regulations that have been in  
22 existence for some period of time.

1 If a party, a commenter argued well  
2 those regulations are very old, you really should  
3 have revisited those before issuing the permit,  
4 generally speaking the agency would not at least  
5 in that proceeding.

6 And that proceeding wouldn't be a  
7 basis for challenging the agency's decision, the  
8 fact that they didn't or haven't revisited those  
9 regulations.

10 It seems to me your efforts to  
11 challenge the aquifer exemption are more like  
12 that. Why isn't it?

13 MR. FRANCO: Why? Because the EPA  
14 through its R9 officials demonstrated that they  
15 could exercise discretion in revising the aquifer  
16 exemption.

17 They specifically wrote to them  
18 requesting that revision which was submitted by  
19 FCI with the proposed aquifer exemption that  
20 brought it down.

21 It brought the 1997 parameters that  
22 are so expansive, it brought it down to the area

1 of the PTF including that 500 foot buffer zone.

2 And that's all they asked for, or  
3 wanted, or needed for the PTF as phase one of  
4 their eventual apparently commercial scale  
5 project.

6 Now, we've heard on that note, let me  
7 just jump to that point in rebuttal, we heard  
8 that it couldn't have been more clearly presented  
9 that this is all part of a subsequent larger  
10 scale commercial project.

11 Well, that's exactly why they chose  
12 apparently not to accept the smaller aquifer  
13 exemption that was submitted by FCI in response  
14 to R9 and they then directed FCI instead to go  
15 back and just adopt the original aquifer  
16 exemption.

17 What if that large scale project never  
18 happened. What if something happens to the  
19 company FCI and they no longer exist or they do  
20 something else?

21 Then you've got what remains this  
22 overexpansive aquifer exemption that takes that

1 area out of regulation under the Safe Drinking  
 2 Water Act.  
 3 And it would remain like that ad  
 4 infinitum in violation of that act that says it  
 5 shall be regulated.  
 6 JUDGE AVILA: Didn't that exist before  
 7 FCI applied for a permit?  
 8 MR. FRANCO: Absolutely.  
 9 JUDGE AVILA: So the fact that there  
 10 was a permit application changes how the state of  
 11 affairs under the 1997 aquifer exemption -- how  
 12 things existed?  
 13 I mean, suppose there were no FCI  
 14 application. Wouldn't today that whole 1997  
 15 aquifer exemption would be legally valid and that  
 16 would not be protected by the Safe Drinking Water  
 17 Act?  
 18 MR. FRANCO: I'm not sure it would be  
 19 legally valid, Your Honor. It would be --  
 20 JUDGE AVILA: It would be in  
 21 existence.  
 22 MR. FRANCO: It would be in existence,

1 of course. But that's the point, that before  
 2 Southwest Value Partners come along, or the town  
 3 of Florence populates, or anybody intending to go  
 4 inject contaminants come along, yes, that's --  
 5 it's a document that has no real impact until it  
 6 does.  
 7 And when it does we've covered the  
 8 regulations that say you've got to follow  
 9 criteria for it. And they themselves asked for  
 10 it.  
 11 I know because of questions and  
 12 answers, am I finished?  
 13 JUDGE AVILA: I'll give you one minute  
 14 to finish up.  
 15 MR. FRANCO: Let me figure out which  
 16 one of these points I'd like to make then.  
 17 The comment was made that the  
 18 exemption cannot be revoked or reissued.  
 19 Frankly, I don't understand that.  
 20 To the extent that that is the case  
 21 then why did R9 write that letter to FCI saying  
 22 we'd rather revoke and reissue as opposed to just

1 transfer the permit to you.  
 2 They're specifically telling them  
 3 that's what we can do, and that's in fact what  
 4 they did here with the new permit.  
 5 There was a representation made that  
 6 we've taken the position that this is the only  
 7 source of drinking water for this area.  
 8 That's not our position. We have not  
 9 said that.  
 10 What our position is is that this is  
 11 the primary source of drinking water for that  
 12 heavily populated area that you saw in that  
 13 colored map. It's the primary. Are there  
 14 others? Sure. How they play into this we're not  
 15 prepared to really address, but the point is that  
 16 they've got and they had the submittal and this  
 17 will be at attachment 13 to our petition from the  
 18 Southwestern -- again, I don't remember their  
 19 name, but the letter is there as an attachment to  
 20 the Dickinson Wright Law Firm's letter submitting  
 21 it by the engineer that did that study and gave  
 22 all the reasons why this is and this LBFU is the

1 primary source of drinking water, not the sole.  
 2 JUDGE AVILA: Okay, your time's up.  
 3 MR. FRANCO: Thank you very much.  
 4 JUDGE AVILA: Thank you very much. I  
 5 want to thank everyone for all their time and  
 6 preparation and very helpful and useful oral  
 7 argument. And we stand adjourned.  
 8 (Whereupon, the above-entitled matter  
 9 went off the record at 3:51 p.m.)  
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