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

In re:	)	
Florence Copper, Inc.	)	UIC Appeal No. 17-03
UIC Permit No. R9UIC-AZ3-FY11-1	)	

PERMITTEE FLORENCE COPPER, INC.'s RESPONSE TO PETITION FOR REVIEW FILED BY SWVP-GTIS MR, LLC AND THE TOWN OF FLORENCE

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STATEMENT OF COMPLIANCE WITH THE WORD LIMITATION

This response brief complies with the 14,000 words limitation found at 40 C.F.R. § 124.19(d)(3).

LEGAL SUMMARY

The petition of SWVP-GTIS MR, LLC and Town of Florence, Arizona ("**Petition**" or "**Petitioners**") admits that no condition or other aspect of underground injection control ("**UIC**") Permit No. R9UIC-AZ3-FY11-1 ("**Permit**") precludes its issuance. Petition at 2. Therefore, the Petition fails to meet the procedural requirements of 40 C.F.R. § 124.19(a)(4)(i) ("a petition for review must identify the contested permit condition or other specific challenge to the permit decision").

By its own admission, the Petition takes issue only with Region 9's decision not to engage in a formal reconsideration of an aquifer exemption that was established in 1997. Petition at 1. However, the Permit implicates the 1997 aquifer exemption only in a most basic manner: "[T]he Permittee shall ensure that there is no migration of injection fluids, process by-products, or formation fluids beyond the exempted zone." Permit at 9 (**Attachment 1**). This Permit requirement would not change even if Region 9 were to alter the dimensional limits of the exemption in the manner sought by Petitioners because the requirement to prevent fluids from migrating beyond the exempted zone is applicable to all UIC permits. 40 C.F.R. §§ 144.52(a)(3), (9). Thus, the precedent that would be set if the Petition is granted is that when any UIC permit holder applies for a replacement permit or permit modification, EPA must reopen the exemption referenced in the permit to consider whether it continues to meet the exemption criteria of 40 C.F.R. § 146.4. There is no support for such a requirement in the existing rules or case law. Moreover, if EPA establishes such a requirement, it should do so in a rulemaking, following notice in the Federal Register and comments from the public. Other UIC permit holders as well as states with delegated UIC programs would have a stake in such a rulemaking. The absence of such a requirement under existing law means Region 9's position that a reopening of the 1997

aquifer exemption is not legally required to support the Permit's issuance is not clearly erroneous. Response to Comments at 14-15 (**Attachment 2**); *see* 40 C.F.R. § 124.19(a)(4)(i)(A).

"Out of an abundance of caution," Region 9 nonetheless considered whether the portion of the 1997 aquifer exemption that would be impacted by the pilot test activities authorized by the Permit continues to meet the aquifer exemption criteria of 40 C.F.R. § 146.4. The Region concluded that it does. Response to Comments at 15-18. If the Board looks past Petitioners' failure to satisfy the threshold requirements of 40 C.F.R. § 124.19(a)(4)(i), the Board should then deny the Petition on its merits because Region 9 duly considered the issues raised by Petitioners' comments on the aquifer exemption relative to the activities governed by the Permit and the Region's rejection of those comments was rational in light of the information in the record before it. *Id.*; *see In re Teck Cominco Alaska Inc.*, 11 E.A.D. 457, 473 (EAB 2004) ("When the Board is presented with technical issues, we look to determine whether the record demonstrates that the Region duly considered the issues raised in the comments and whether the approach ultimately adopted by the Region is rational in light of all the information in the record.").

DETAILED RESPONSE

Permittee Florence Copper, Inc. ("**FCI**") requests that the Environmental Appeals Board deny the Petition because: (1) the Petition does not satisfy the threshold requirements of 40 C.F.R. § 124.19(a)(4)(i); (2) the Petition does not demonstrate that Region 9's responses to Petitioners' comments on the 1997 aquifer exemption were clearly erroneous; and (3) Petitioners are inappropriately attempting to use the Environmental Appeals Board process to achieve a priority of residential use over other beneficial uses of groundwater.

1. The Petition Does Not Satisfy the Threshold Requirements of 40 C.F.R. § 124.19(a)(4)(i).

40 C.F.R. § 124.19(a)(4)(i) provides as follows:

> (4) Petition contents.
>
> > (i) In addition to meeting the requirements in paragraph (d), a petition for review must identify the contested permit condition or other specific challenge to the permit decision and clearly set forth, with legal and factual support, petitioner's contentions for why the permit decision should be reviewed. The petition must demonstrate that each challenge to the permit decision is based on:
> >
> > > (A) A finding of fact or conclusion of law that is clearly erroneous, or
> > >
> > > (B) An exercise of discretion or an important policy consideration that the Environmental Appeals Board should, in its discretion, review.

(Emphases added.)

The Petitioners "bear[] the burden of demonstrating that review is warranted." *In re Seneca Res. Corp.*, 2014 EPA App. LEXIS 21, at *3 (EAB 2014). If the Board concludes that petitioners have not met the "threshold requirement[s]" above, the Board typically "denies or dismisses the petition for review" without considering the merits of the petition. *Id.*

In this case, the Petition admits that Petitioners' appeal "is limited to the decision to leave in place a 20-year old aquifer exemption…" Petition at 1, referring to a 1997 aquifer exemption within which the pilot test project that is authorized by the Permit would be conducted. The only relief that Petitioners seek is a formal proceeding by Region 9 to reevaluate the portion of the aquifer that is covered by the exemption to determine whether it still satisfies the exemption criteria of 40 C.F.R. § 146.4. Petition at 2. Petitioners assert that such a proceeding would result in a reduction of the lateral and vertical limits of the aquifer exemption to dimensions that tightly circumscribe the permitted activity. Petition at 2. The balance of the Petition is comprised of unfounded allegations of fact and law that Petitioners assert justify a reopening of the exemption and a reduction in the size of the exempted zone (discussed in Section 2, below). However, it should be unnecessary to rebut Petitioners' unfounded allegations because the Petition fails to "identify the contested permit condition or other specific challenge to the permit decision," as required by 40 C.F.R. § 124.19(a)(4)(i). On these grounds alone, the Board should deny the Petition.

That the Petition does not satisfy 40 C.F.R. § 124.19(a)(4)(i) is underscored by the reality that, even if Region 9 were to reduce the size of the exempted zone to the dimensions sought by Petitioners, no change would result to the Permit's basic requirement that "the Permittee shall ensure that there is no migration of injection fluids, process by-products, or formation fluids beyond the exempted zone." Permit at 9. This is because the requirement to prevent fluids from migrating beyond the exempted zone is applicable to all UIC permits. *See* 40 C.F.R. § 144.52(a)(3) *and* (9) (requiring all UIC permits to include provisions to assure injected fluids do not migrate and formation fluids are not displaced into any underground source of drinking water); 40 C.F.R. § 144.3 (excluding aquifer exemption zones from the definition of

"underground source of drinking water").[1] The only Permit condition that would need to be adjusted is a provision that conditions the actual depths of wells' annular conductivity devices (which are used to detect vertical migration channels alongside the wells) on the actual depths of the exempted zone. *See* Permit at 13-14 ("The ACD . . . shall never be . . . more than 10 feet above the exempted zone in the Lower Basin Fill Unit (LBFU) if the [Middle Fine-Grained Unit] base is more than 200 feet above the LBFU (vertical limit of the exempted zone)"). The purpose of this condition is to help ensure that no migration of injection fluids, process by-products, or formation fluids occurs beyond the exempted zone, in keeping with the basic requirement on page 9 of the Permit. However, the Petition takes no issue with this condition or any other condition or aspect of the Permit.[2] This is a pleading failure of the first order and warrants the Petition's dismissal. *See In re Seneca Res. Corp.*, 2014 EPA App. LEXIS 21, at *7 (holding

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[1] *See also* 40 C.F.R. § 144.51(l)(6)(ii) (including among "conditions applicable to all permits" the requirement of a 24-hour report to EPA in the event of any noncompliance with a permit condition or malfunction of an injection system that may cause "fluid migration into or between USDWs"); 40 C.F.R. § 144.28(b)(2) (same requirement specifically for Class III wells).

[2] Region 9's January 30, 2017 notice of stay of contested Permit conditions states that Petitioners "did not clearly identify contested permit conditions" but then infers that the Petition contests two permit conditions: "Exempted Zone" and "No Migration into or between Underground Sources of Drinking Water (USDWs)." **Attachment 3**, at 1-2. FCI respectfully disagrees with the inference. On its face, the Petition does not characterize its arguments concerning the 1997 aquifer exemption as arguments against permit conditions. Nor does the Petition challenge any conditions of the Permit that are geared to prevent migration of fluids into or between USDWs. To the contrary, Petitioners admit that they have no issue with the Permit's conditions. Petition at 1-2. Moreover, it was not necessary for Region 9 to construe that the Petition contests permit conditions in order to justify a stay of the Permit pending this appeal. *Compare* 40 C.F.R. § 124.16(a)(1) ("If the permit involves a new facility or new injection well . . . the applicant shall be without a permit for the proposed new facility, injection well . . . pending final agency action") (emphasis added) *with* 40 C.F.R. § 124.16(a)(2)(i) ("The Regional Administrator shall identify the stayed provisions of permits for existing facilities, injection wells . . . All other provisions of the permit for the existing facility, injection well . . . become fully effective and enforceable 30 days after the date of the notification required in paragraph (a)(2)(ii) of this section); *see* 40 C.F.R. §§ 124.2 and 146.3 ("Facility or activity means any 'HWM facility,' UIC 'injection well,' NPDES "point source" or "treatment works treating domestic sewage" or State 404 dredge or fill activity, or any other facility or activity (including land or appurtenances thereto) that is subject to regulation under the RCRA, UIC, NPDES, or 404 programs."). (Emphases added.)

petitioner had "not met her burden to demonstrate why the UIC permit . . . warrants review" because none of the petitioner's concerns "identify the contested permit decision or other specific challenge to the permit decision") (emphasis added); *see also* 78 Fed. Reg. 5281, 5284/3 (January 25, 2013) (explaining the "other specific challenge" clause of § 124.19(a)(4)(i) "is intended to capture permit challenges that are within the Environmental Appeals Board's existing scope of review" and is "not intended to expand the Board's existing scope of review.") (emphasis added).

The Petition fails, moreover, to demonstrate that Region 9's position that the law does not require a reconsideration of the 1997 aquifer exemption as part of the Permit proceeding is "clearly erroneous," as required by §124.19(a)(4)(i)(A). Indeed, Petitioners acknowledge that there is no regulatory requirement to reopen an existing aquifer exemption if an associated UIC permit is revoked in favor of a replacement permit. *See* Petition at 35. Given that the Permit's requirement to ensure that no fluids migrate beyond the exempted zone applies to all UIC permits, what Petitioners are essentially requesting—and what would result if their request for relief is granted—is precedent in case law that, whenever a UIC permit holder applies for a replacement permit or permit modification, the aquifer exemption referenced in the permit must be reopened to determine whether it still meets the exemption criteria of 40 C.F.R. § 146.4. There is no support for this notion in the existing case law and Petitioners can point to no support for it in the rules. The absence of such law means Region 9's position that a reopening of the 1997 exemption is not legally required to support the Permit's issuance was not clearly erroneous. *See* 40 C.F.R. § 124.19(a)(4)(i)(A); *cf. In re Envtl. Disposal Sys.*, 14 E.A.D. 96, 120 (EAB 2008) ("In the absence of a statutory or regulatory mandate that the Region consider purported cures of permit violations during a permit termination proceeding, the Region is not

bound to do so . . . Accordingly, the Board concludes that the Region's conclusion of law that the consideration of corrected permit violations is discretionary is not clearly erroneous.").

Region 9 fully explained its position on its treatment of the 1997 aquifer exemption in its Response to Petitioners' comments. *Compare* Southwest Value Partners' Comments on Draft Permit, at 7-12 and Appendix F (**Attachment 4**) *with* Response to Comments at 14-18.[3] Since the record demonstrates that Region 9 duly considered Petitioners' comments and ultimately adopted a position that is not inconsistent with applicable law, the Board should uphold Region 9's determination that the Permit's issuance does not necessitate a reopening of the 1997 aquifer exemption. *Id.*; *see also In re FutureGen Indus. Alliance, Inc.*, 2015 EPA App. LEXIS 11, at *5-6 (EAB 2015) ("As a whole, the record must demonstrate that the permit issuer 'duly considered the issues raised in the comments' and ultimately adopted an approach that 'is rational in light of all information in the record.'") (quoting *In re Gov't of D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323, 342 (EAB 2002)).

Nor should the Board entertain, as a matter of first impression, the notion that an existing aquifer exemption must be reevaluated whenever a UIC permit holder applies for a replacement or modified permit that references the exemption. First, the Petition fails to cite a single policy consideration or other reason in favor of such precedent. The Petitioners' statement that "[t]he decision also implicates important policy considerations at a time when USEPA's UIC program and its procedures and guidelines for issuing aquifer exemptions is under scrutiny," Petition at 3, is without support in the Petition. *See* 40 C.F.R. § 124.19(a)(4)(i)(B); *In re Merck & Co.*, 2000 EPA App. LEXIS 50, at *10 (EAB 2000) ("In the absence of information addressing why the

[3] The Town of Florence's comments on the Draft Permit incorporated Southwest Value Partners' comments regarding the 1997 aquifer exemption. Town of Florence's Comments on Draft Permit, at 2 (**Attachment 5**).

Region's explanation reflects either error and/or an important policy consideration warranting Board review, [the petitioner] fails to meet her burden.") (citing *In re Caribe Gen. Elec. Prods., Inc.*, 8 E.A.D. 696 (EAB 2000)). Second, any new requirement that an existing aquifer exemption must be reevaluated whenever a replacement or modified permit referencing the exemption is issued should be made in a rulemaking in accordance with the requirements of 5 U.S.C. § 553 of the Administrative Procedure Act. Such a rulemaking would necessarily consider the settled expectation and reliance interests of FCI and other UIC permittees, in addition to giving EPA the benefit of public comments before it decides whether to impose such a drastic change in the law. *See* 5 U.S.C. § 551 (definition of "rule"). The law already affords Petitioners the opportunity to petition EPA for such a rulemaking. 5 U.S.C. § 553(e); *Auer v. Robbins*, 519 U.S. 452, 459 (1997) (explaining that 5 U.S.C. § 553(e) allows any interested person to petition a federal government agency for a rulemaking and that a denial of the petition can be appealed to the courts under 5 U.S.C. §§ 702 and 706). All UIC permit holders would have a stake in such a rulemaking because, again, the requirement to prevent fluids from migrating beyond the exempted zone is applicable to all UIC permits. [4] All states with delegated UIC programs would also have a stake in such a rulemaking because the requirement to prevent fluids from migrating beyond the boundaries of an aquifer exemption is a federally required feature of their programs. *See, e.g.*, Wyo. Code R. §§ 020-0007-11, 020-0011-27. In the meantime, Region 9's determination that the existing rules do not require a reopening of the 1997 aquifer exemption as a precondition of issuing the Permit is not clearly erroneous. In the

[4] EPA's Interactive Aquifer Exemptions Map, Tab "Well Class" identifies UIC permitted wells that are associated with existing aquifer exemptions, including several Class III wells, at: https://epa.maps.arcgis.com/apps/MapSeries/index.html?appid=426ef9d346f9487e96ee5899ab67a2e4.

absence of any citation to law or important policy consideration in the Petition, the Board should affirm Region 9's determination and deny the Petition.

2. <u>The Petition Does Not Demonstrate that Region 9's Responses to Petitioners' Comments on the 1997 Aquifer Exemption were Clearly Erroneous.</u>

When a petition for review challenges the permit issuer's findings of fact, the petition must demonstrate that the findings of fact were clearly erroneous and that the permit issuer's responses to the petitioner's comments on those facts in relation to the draft permit were clearly erroneous or otherwise warrant review. 40 C.F.R. § 124.19(a)(4)(i)(A) *and* (ii). On technical or scientific issues, the Board typically defers to a permit issuer's technical expertise and experience, as long as the permit issuer adequately explains its rationale and supports its reasoning in the administrative record. *In re Dominion Energy Brayton Point, L.L.C.*, 2006 EPA App. LEXIS 9, at *46-47 (EAB 2006); *see also In re Envotech, L.P.*, 6 E.A.D. 260, 284 (EAB 1996) ("absent compelling circumstances, the Board will defer to a Region's determination of issues that depend heavily upon the Region's technical expertise and experience"). It is not sufficient for a petitioner to assert merely a "difference of opinion or an alternative theory regarding a technical matter." *In re Ne Hub Partners, L.P.*, 7 E.A.D. 561, 567 (EAB 1998). In challenging technical determinations, the petitioner bears a "particularly heavy burden" to show that the permit issuer has clearly erred. *In re Peabody Western Coal Co.*, 2005 EPA App. LEXIS 2, at **30-31 (EAB 2005).

If the Board looks past Petitioners' failure to satisfy the threshold requirements of 40 C.F.R. § 124.19(a)(4)(i) (discussed in Section 1, above), FCI respectfully requests that the Board uphold Region 9's conclusion—which is based on a technical analysis performed by Region 9 "out of an abundance of caution"—that the portion of the exempted aquifer that would be affected by the pilot test activities continues to meet the aquifer exemption criteria of 40 C.F.R. §

146.4(a) and (b)(1). Response to Comments at 15-18; *see* Statement of Basis of Draft Permit ("**Statement of Basis**") at 12-15 (**Attachment 6**). In support of this request, FCI incorporates herein the portions of Region 9's Response to the Petition that pertain to whether the criteria of 40 C.F.R. § 146.4 continue to be met. *See* Region 9's Response to Petition. Petitioners are asserting a "difference of opinion or an alternative theory" on the technical and scientific judgments described in Region 9's Response to Comments on the Draft Permit and Region 9's analysis and rejection of Petitioners' comments were rational in light of the information in the record before Region 9 when it issued the Permit. Therefore, the Petition should be denied. *See In re Ne Hub Partners, L.P.*, 7 E.A.D. at 567; *In re Teck Cominco Alaska Inc.*, 11 E.A.D. at 473 (EAB 2004); *In re FutureGen Indus. Alliance, Inc.*, 2015 EPA App. LEXIS 11, at *5-6.

The Petition also fails to demonstrate that Petitioners' comments on the Draft Permit included technical or scientific information or other facts to support a conclusion that any portion of the 1997 aquifer exemption no longer meets the exemption criteria of 40 C.F.R. § 146.4(a) and (b)(1). It is important to note that Petitioners offered absolutely no technical or scientific information that any part of the exempted zone currently serves as a source of drinking water. For purposes of § 146.4(a), "an aquifer serves as a current source of drinking water if that water is within the capture zone of an existing water well used for human consumption." Letter from William Honker, U.S. EPA Region 6, to New Mexico Environmental Law Center (June 27, 2012) at 2 (**Attachment 7**).[5] Nothing in Petitioners' comments identified the existence of a water well that is presently being used for human consumption and includes the exempted zone within its groundwater capture zone—let alone groundwater modeling that demonstrates the occurrence of an actual groundwater drawdown within the exempted zone that is caused by an existing

[5] This same letter is Attachment 35 to the Petition and is cited on page 36 of the Petition.

drinking water well. *See* Southwest Value Partners' Comments on Draft Permit (Appendices F and G); Town of Florence's Comments on Draft Permit (attached April 10, 2015 letter from Southwest Ground-water Consultants, Inc.). Indeed, Petitioners offered no modeling of the potential capture zone of any existing well that is being used for human consumption. *Id.* Given the reams of comments that Petitioners filed specifically concerning the availability for human consumption of groundwater from the aquifer that includes the exempted zone, including comments by experts retained by Petitioners,[6] if information existed to defeat the satisfaction of § 146.4(a), surely they would have provided it. In reality, nothing in the administrative record of the Permit warrants upsetting the conclusion that the zone of the aquifer covered by the 1997 aquifer exemption meets § 146.4(a).

Under 40 C.F.R. § 146.4(b)(1), an aquifer exemption that satisfies § 146.4(a) is a valid exemption as long as the portion of the aquifer covered by the exemption is demonstrated to contain minerals "that considering their quantity and location are expected to be commercially producible." This demonstration was made by FCI's predecessor-in-interest, BHP Copper, Inc. ("**BHP**"), in support of the 1997 aquifer exemption and was accepted by Region 9. Statement of Basis at 12-13; Response to Comments at 14; *see also* 1997 Aquifer Exemption (**Attachment 8**). Nothing in Petitioners' comments on the Draft Permit demonstrates that the portion of the aquifer covered by the 1997 exemption no longer contains minerals that are commercially producible. Consequently, nothing in the Petition demonstrates that any Region 9 analysis in this regard was clearly erroneous.

It only makes sense that Petitioners cannot make such demonstrations: once a commercially producible mineral is located and established, it remains so until it is mined. There

[6] *See* Southwest Value Partners' Comments on Draft Permit, at Preface 1-2 and Appendices F, G, H and O.

is nothing in the administrative record indicating that prices of refined copper have changed so drastically as to make what was commercially producible in 1997 no longer commercially producible. That FCI would proceed with the pilot project authorized by the Permit speaks for itself. Nor is it relevant that the aquifer exemption was issued in relation to a permit originally issued to BHP. *Compare* Petition at 10, 21 *with* Response to Comments at 14-18. A determination that a portion of an aquifer contains commercially producible minerals logically runs with the aquifer, not with the permit.

To the extent that Petitioners challenge Region 9's determination, in 1997, to include the lower 200 feet of the LBFU within the exemption in order to accommodate mineral extraction from the aquifer, such a challenge is time-barred. *Compare* Southwest Value Partners' Comments on Draft Permit, at 11 ("We challenge EPA to provide even one fact that justifies granting an aquifer exemption to any portion of the LBFU . . .") *and id.* at F-2 ("only the Oxide Zone contains copper in quantities presenting the potential for commercial production") *with* 42 U.S.C. 300j-7(a)(2) (stating a petition for review of "other final action" under the Safe Drinking Water Act shall be filed within 45 days after the action and may be filed after the expiration of such 45-day period only based on grounds "arising after the expiration of such period"); *see Western Nebraska Res. Council v. EPA*, 793 F.2d 194 (8th Cir. 1986) (stating the "strict 45-day limitation of section 300j-7(a)" is "intended and in fact brings finality to the administrative process and reflects 'a deliberate congressional choice to impose statutory finality on agency [action], a choice we may not second-guess.'") (quoting *Eagle-Picher Indus., Inc. v. EPA*, 759 F.2d 905, 911 (D.C. Cir. 1985)).[7, 8] That said, there is no rule that restricts EPA's application of

[7] *See also Cal. Sea Urchin Comm'n v. Bean*, 828 F.3d 1046, 1049 (9th Cir. 2016) (stating complaints for judicial review "must be brought within six years of the agency action that is challenged") (citing 28

40 C.F.R. § 146.4(b)(1) to one that confines "[a]n aquifer or portion thereof" to a single geological unit. To the contrary:

> The LBFU and the highly fractured ore body are directly connected hydrologically, and therefore, both formations are a part of the aquifer that EPA exempted. A commercially producible quantity of copper is present within the aquifer that is comprised of both the ore body and portions of the LBFU. Therefore, EPA properly determined, when approving the aquifer exemption in 1997, that the portion of the aquifer being exempted contained a commercially producible quantity of a mineral and met the criteria in 40 CFR § 146.4(b)(1).

Response to Comments at 17.

Based on the foregoing, it was entirely appropriate for Region 9 to decide against reopening the 1997 aquifer exemption. Response to Comments at 14-18. There is nothing in the administrative record that would justify a different conclusion by the Board.

3. Petitioners Are Inappropriately Attempting to Use the Environmental Appeals Process to Achieve a Priority of Residential Use Over Other Beneficial Uses of Groundwater.

State law governs the prioritization of different uses of water and adjudication of water withdrawal rights, unless federal law explicitly provides otherwise. *See, e.g.*, *United States v. New Mexico*, 438 U.S. 696, 701 (1978) (holding that, except for water "necessary to fulfill the

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U.S.C. § 2401(a)); *Sendra Corp. v. Magaw*, 111 F.3d 162, 165 (D.C. Cir. 1997) (stating six-year limitation period of 28 U.S.C. § 2401(a) applies "[u]nless another statute provides otherwise").

[8] It should be noted that Petitioners cite to no precedent for allowing challenges to aquifer exemptions without regard to applicable limitations periods. Contrary to their statement on page 36 of the Petition, Region 6 did not "reopen[]" the 23-year old exemption in the Church Rock, New Mexico case. Region 6 simply stated that, "[s]hould water sources be discovered within close proximity to the exemption, Region 6 will assess the capture capacity of those identified." Petition, Attachment 35, at 2 (identified in footnote 136 of the Petition as Attachment 34). That statement does not imply that Region 6 has duly considered whether it has legal authority to reopen a decades old aquifer exemption regardless of a permittee's settled expectation or reliance interests in the exemption. Similarly, Page 36 of the Petition claims that Region 6 "revised a recently-issued aquifer exemption" in Goliad, Texas "to reduce the area covered by the exemption." The truth is that Region 6's approval of the Goliad exemption was timely appealed to the Fifth Circuit Court of Appeals, as required by 42 U.S.C. § 300j-7(a)(2), and the court remanded the approval for reconsideration relative to the exemption criteria of 40 C.F.R. § 146.4. *See* Petition, Attachment 36, at 1-2 (identified in footnote 137 of the Petition as Attachment 35).

very purpose for which a federal reservation was created," state laws control both public and private appropriations of water); *accord Swim v. Bergland*, 696 F.2d 712, 716 (9th Cir. 1983) (excepting water necessary to effectuate federal treaties with recognized Indian tribes). The Safe Drinking Water Act does not govern, let alone preempt state laws governing, the prioritization of different uses of groundwater and the adjudication of groundwater withdrawal rights. *See* 42 U.S.C. § 300f et seq.; *cf.* 42 U.S.C. § 300h(b)(3)(A) (stating EPA's regulations governing state UIC programs "shall permit or provide for consideration of varying geological, hydrological, or historic conditions in different States and in different areas within a State.").

Arizona's Groundwater Management Act ("**GMA**"), adopted in 1980, sets forth the mechanisms by which rights to withdraw groundwater are established and protected in the State's regulated aquifers. Ariz. Rev. Stat. ("**A.R.S.**") Title 45, Chapter 2. The GMA balances groundwater uses between municipal uses (including residential development), agriculture and industrial uses, including mining. It does not grant a right of expectation that an aquifer will be available exclusively for use as a drinking water source but rather recognizes that an aquifer may be used for many things, including mineral extraction (A.R.S. § 45-514) and other industrial uses. *See* A.R.S. Title 45, Chapter 2, Article 7. Importantly, the regulations adopted pursuant to the GMA and enforced by Arizona's Department of Water Resources ("**ADWR**") prevent the same portion of an aquifer from being used by multiple water users. Ariz. Admin. Code ("**A.C.C.**") § R12-15-801 et seq. Such a result is squarely anticipated by 40 C.F.R. § 146.4(b)(1): any portion of an aquifer that is exempted from the rules that govern "underground sources of drinking water" based in material part on § 146.4(b)(1) is exempted precisely "because" it contains commercially producible minerals.

The GMA does not elevate potential residential development above rights that have been previously established to extract groundwater for other purposes. Rather, any plan to use a well to pump groundwater in support of residential development within an "Active Management Area" ("**AMA**") must demonstrate that the groundwater drawdown from the well will not interfere with the ability of holders of existing groundwater withdrawal rights to extract groundwater to which they are already legally entitled. A.R.S. § 45-598; A.A.C. § R12-15-1302. In addition, any planned residential subdivision within an AMA cannot be approved unless the developer is able to demonstrate that the development will have 100 years of legally and physically available groundwater in amounts necessary to sustain the development, taking into account all pre-existing rights to use groundwater from the same aquifer, such as pre-existing rights to use the groundwater for mineral extraction. A.C.C. § R12-15-701 et. seq.

FCI's property, including the pilot test project authorized by the Permit, is located within the Pinal AMA, which is subject to regulation under the GMA.[9] FCI holds existing rights under the GMA to withdraw groundwater in amounts necessary both to support mineral extraction during the pilot test project and to perform full-scale commercial mineral extraction on its property. *See* Permits to Withdraw Groundwater for Mineral Extraction and Metallurgical Processing (**Attachment 9**).[10] Under the GMA, FCI's priority rights would have to be taken into account before ADWR authorizes groundwater withdrawals from the aquifer that includes the

[9] *See* http://www.azwater.gov/AzDWR/Watermanagement/AMAs/PinalAMA/documents/ch1-pinal.pdf.

[10] The permits include iterations held by FCI's predecessors in interest. FCI's permit is currently undergoing administrative renewal. *See* A.R.S. § 45-514(B) ("A [mineral extraction and metallurgical processing] permit issued pursuant to this section shall be granted for a period of up to fifty years, subject to renewal under the same criteria used in granting the original permit."); A.R.S. § 45-527 ("A permittee may seek modification of an unexpired groundwater withdrawal permit and renewal of a permit within six months prior to the date of the expiration of the permit. All permit modifications or renewal applications shall be treated in the same manner as the initial permit application and are subject to the same criteria used in issuing the initial permit.").

exemption, whether for residential development or otherwise. A.R.S. § 45-598; A.A.C. § R12-15-1302. The GMA effectively prohibits any residential development from interfering with FCI's pre-existing rights to use groundwater for both the pilot test project and full-scale commercial mineral extraction. Petitioners are surely aware of these fundamental features of Arizona law governing the use of groundwater, which is why they seek to use the Environmental Appeals Board process to obviate them.

Petitioners are attempting to impair the value of FCI's pre-existing, priority rights to withdraw groundwater in amounts necessary to perform full-scale commercial mineral extraction in the future by pursuing a reduction in the lateral and vertical limits of the 1997 aquifer exemption to exclude the portion of the exemption within which the commercial mineral extraction would be performed. *See* Petition at 2, 37. Full-scale commercial mineral extraction, however, is not accommodated by the Permit, so concerns relating to it are properly outside the scope of this appeal proceeding.[11]

Petitioners also advance the false and irrelevant claim that the dimensions of the 1997 aquifer exemption are inappropriate because full-scale commercial mineral extraction outside of the state-owned land on which the pilot test project would be conducted is illegal under the Town of Florence's current zoning ordinance. Petition at 27, 34, 37. Petitioners' claim is false for two reasons. First, the property that is privately owned by FCI and on which the full-scale commercial mineral extraction would occur is subject to a Pre-Annexation Development

[11] FCI reserves the right to argue in any administrative or judicial proceeding that any application of 40 C.F.R. § 146.4 that has a result of frustrating FCI's groundwater rights under the GMA or FCI's other expectation or reliance interests constitutes a violation of federal law, including, but not limited to, the Fifth and Tenth Amendments of the United States Constitution. *See Royal Manor, LTD. v. United States*, 69 Fed. Cl. 58, 60-63 (2005) (discussing elements of an as-applied federal regulatory takings claim); *Bond v. United States*, 564 U.S. 211, 220 (2011) ("The individual, in a proper case, can assert injury from governmental action taken in excess of the authority that federalism defines. Her rights in this regard do not belong to a State.").

Agreement ("**PADA**") and incorporated Development Plan executed with the Town of Florence by the property's prior owner in 2003 pursuant to A.R.S. § 9-500.05. Section 9-500.05 authorizes a municipality to enter into development agreements with private property owners to establish the rights and obligations of both parties with respect to a particular development project. A.R.S. § 9-500.05(A) *and* (H)(1). The PADA created vested rights that run with the land, and expressly preserved mining rights on the property as a contractual nonconforming use in the incorporated Development Plan for the property. PADA, Exhibit B, Section III.B.7, at 29-30 (**Attachment 10**). The zoning ordinance described in the Petition was enacted four years later, in 2007. *See* Town of Florence Zoning Ordinance Resolution (**Attachment 11**). Therefore, the PADA precludes that zoning ordinance from prohibiting full-scale commercial mineral extraction on FCI's private property. Second, FCI retains a grandfathered right to conduct mineral extraction on its private property as a legal non-conforming use of land within the Town of Florence's municipal boundary. A.R.S. § 9-462.02; *see also* A.R.S. § 9-500.05(D) (stating the burdens of a PADA "are binding on, and the benefits of the agreement inure to, the parties to the agreement and to all their successors in interest and assigns.").[12]

Petitioners' claim that full-scale commercial mineral extraction on FCI's private property is prohibited by the Town's zoning ordinances is also irrelevant. Again, full-scale commercial mineral extraction on private property is not accommodated by the Permit, such that Petitioners' claim is properly outside the scope of this appeal proceeding.

[12] The Town of Florence's claims that are described in this paragraph are the subject of a lawsuit that was initiated by the Town of Florence against FCI. *Town of Florence v. Florence Copper Inc.*, No. CV2015-000325, Superior Court of Maricopa County, Arizona. As of the date of this filing, a ruling is pending on the parties' motions for summary judgment and no trial date has been set.

Region 9, based on the record before it and its technical expertise and experience, has determined that the pilot test project which is authorized by the Permit will not prevent any portion of the aquifer outside the zone of the 1997 aquifer exemption from being used as an underground source of drinking water. *See* Response to Comments at 36 ("The permit is specifically written to prevent contaminants from migrating out of the exempted aquifer and into a USDW relied upon by local residents."); *id.* at 43 ("the Agency has thoroughly considered the ways in which fluids can escape from the injection activity into a USDW and concluded that the UIC permit conditions are fully compliant with the mandates of the UIC regulations to protect USDWs"); *id.* at 18, 19, 20, 29, 30, 32, 34, 35, 39, 44 and 47 (explaining how the Permit protects USDW). Petitioners have not demonstrated that Region 9's determination was clearly erroneous. Therefore, the pilot test project should be allowed to proceed according to the terms and conditions of the Permit.

CONCLUSION

For the reasons stated above, FCI requests that the Environmental Appeals Board deny the Petition.

Dated: April 6, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the attached **PERMITTEE FLORENCE COPPER, INC.'s RESPONSE TO PETITION FOR REVIEW FILED BY SWVP-GTIS MR, LLC AND THE TOWN OF FLORENCE** to be served by e-mail and by Federal Express (flash drive, next day delivery) upon the persons listed below.

Dated: April 6, 2017

_____

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