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

In re:	)	
Archer Daniels Midland Company	)	UIC Appeal No.: 17-05
Permit No.: IL-115-6A-0001	)	

ARCHER DANIELS MIDLAND COMPANY
RESPONSE TO PETITIONS FOR REVIEW

Steven J. Murawski
Archer Daniels Midland Company
4666 Faries Parkway
Decatur, IL 62526
Phone: 217-451-7918
Fax: 217-424-6196

Robert F. Van Voorhees
Bryan Cave LLP
1155 F Street, N.W., Suite 700
Washington, D.C. 20004
Phone: 202.508.6014
Fax: 202.220.7314

Counsel for Archer Daniels Midland Company

DATED: March 8, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Federal Regulations

Miscellaneous

TABLE OF ATTACHMENTS

1. Office of Water, U.S. EPA, EPA 816-R-13-005, Geologic Sequestration of Carbon Dioxide, Underground Injection Control (UIC) Program Class VI Well Area of Review Evaluation and Corrective Action Guidance (May 2013)

2. Permit Attachment F: Emergency and Remedial Response Plan

Other referenced attachments will be filed by Respondent the Environmental Protection Agency Region 5.

I. INTRODUCTION

Pursuant to 40 C.F.R. § 124.19(b)(3), the Archer Daniels Midland Company ("ADM") hereby responds to the Petition for Review submitted by Jeffrey Sprague ("Petitioner") in Appeal No. UIC 17-05 on February 7, 2017. On December 1, 2014, the United States Environmental Protection Agency ("EPA") Region 5 ("Region") issued a final Underground Injection Control ("UIC") permit to ADM (Permit No.: IL-115-6A-0001) to construct and operate a Class VI well at ADM's Decatur, Illinois facility. ADM constructed and tested the permitted well ("CCS#2") during 2015. On November 8, 2016 EPA proposed modifications to the Class VI permit for CCS#2 to address construction, logging and testing results and other information that ADM submitted to EPA following construction of the well. The proposed modifications related to the size of the area of review, final injection and monitoring well construction, and injection start-up procedures as well as editorial or clarifying changes. EPA initiated a public comment period ending on December 14, 2016 to allow comment on the proposed modifications, stating: "Only the conditions proposed for modification are re-opened for comment." Petitioner submitted comments to EPA in response to the notice of proposed modifications. Petitioner seeks review by the Environmental Appeals Board ("Board") of EPA's issuance of final permit modifications on January 19, 2017.

In any appeal from a permit decision issued under part 124, the petitioner bears the burden of demonstrating that review is warranted. 40 C.F.R. § 124.19(a)(4). The petitioner bears that burden even when the petitioner is unrepresented by counsel (or pro se), as is the case here. *In re Seneca Resources Corp.*, 16 E.A.D. __, UIC Nos. 14-01, 14-02, & 14-03, slip op. at 2-3 (EAB May 29, 2014); *In re New Eng. Plating Co.*, 9 E.A.D. 726, 730 (EAB 2001); *In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 249-50 (EAB 1999). For the reasons set forth

below, the Petitioner has failed to meet the burden of demonstrating that review is warranted. Therefore, ADM requests that the Board deny the Petition for Review.

II. STATUTORY AND REGULATORY FRAMEWORK

Section 124.19 of Title 40 of the Code of Federal Regulations ("C.F.R.") governs review of UIC permits. In determining whether to review a petition filed under 40 C.F.R. § 124.19(a), the Board considers certain threshold requirements. The Board will not grant review of a permit unless the permit decision either is based on a clearly erroneous finding of fact or conclusion of law, or involves a matter of public policy or exercise of discretion that warrants review. 40 C.F.R. § 124.19(a). The Board will not rule on matters that are outside the permit process. *See, e.g.*, *In re Federated Oil & Gas of Traverse City*, 6 E.A.D. 722, 725-26 (EAB 1997). The Board has stated, the Safe Drinking Water Act and UIC regulations establish "the only criteria that EPA may use in deciding whether to grant or deny an application for a UIC permit." *In re Envotech, L.P.*, 6 E.A.D. 260, 264 (EAB 1996). In this instance, the Petitioner must demonstrate that the conditions of the permit issued by the Region are insufficient to comply with applicable federal regulations governing Class VI UIC injection wells.

The background of EPA's regulations governing geologic sequestration of carbon dioxide (CO_2) is amply described by the Board in its order denying review of the first four Class VI permits issued by EPA. *In re FutureGen Industrial Alliance, Inc.*, 16 E.A.D. __, UIC 14-68; UIC 14-69; UIC 14-70; UIC 14-71 (Consolidated), slip op. at 6-9 (April 28, 2015). That case involved the first four Class VI permits issued by EPA, but to date none of those wells has been constructed. This case involves the first Class VI well permit to become final and the first Class

VI well to be constructed under a Class VI permit,[1/] following an appeal to this Board that was dismissed on November 26, 2014 in response to Petitioner's voluntary withdrawal. *See* Order Dismissing Petition for Review, *In re Archer Daniels Midland Company*, UIC No. 14-72 (Nov. 26, 2014). (*"In re ADM").*

Congress enacted the Safe Drinking Water Act, as amended ("SDWA"), 42 U.S.C. §§ 300f, et seq. (2012), to protect the nation's drinking water. 42 U.S.C. § 300h. Part C of the SDWA establishes a regulatory program "to prevent underground injection which endangers drinking water sources." 42 U.S.C. § 300h(b)(1). The SDWA directs EPA to promulgate minimum requirements for state UIC programs and requires states seeking UIC program authority to meet those minimum requirements. 42 U.S.C. § 300h-1. In states without an approved UIC program for any particular class of injection wells, EPA implements the federal UIC program for that class of wells. EPA, "Announcement of Federal Underground Injection Control (UIC) Class VI Program for Carbon Dioxide (CO2) Geologic Sequestration (GS) Wells", 76 Fed. Reg. 56982, 56983 (Sept. 15, 2011). On September 7, 2011, EPA's regulations governing Class VI UIC wells became effective. *Id.* EPA has not authorized the State of Illinois ("Illinois") to administer the Class VI UIC program. *Id.; see also* 40 C.F.R. § 147.700. Therefore, Class VI wells in Illinois are regulated by the Region.

The Region implements the Class VI UIC program in accordance with 40 C.F.R. parts 124, 144 and 146. Part 144 establishes the general regulatory framework, including permit requirements, for EPA-administered UIC programs. 40 C.F.R. §§ 144.1, et seq. Subpart H of part

---

1/ ADM had previously constructed and operated CCS#1 well under a Class I permit issued by the Illinois Environmental Protection Agency, and that permit was subsequently converted to a Class VI permit issued by EPA Region 5. UIC Class VI Permit No. IL-115-6A-0002, issued Dec. 23, 2014, became effective on Feb. 12, 2015.

146 provides criteria and standards applicable to UIC Class VI wells. 40 C.F.R. §§ 146.81 to 146.95. These regulations specifically apply to any underground injection well used to inject carbon dioxide (CO_2) streams in supercritical form into the deep subsurface for geologic sequestration. 40 C.F.R. § 146.81(b). To obtain a UIC Class VI well permit, an applicant must satisfy permitting requirements contained in these regulations.

III. FACTUAL AND PROCEDURAL BACKGROUND

On April 15, 2014, Region 5 issued a draft Class VI permit to inject carbon dioxide for the purpose of geologic sequestration (permit number IL-115-6A-0001) to ADM and invited public comment. Fourteen parties, including the Petitioner in this case, submitted comments to the Region, either in writing or during a public hearing held on May 21, 2014 (or both). The Region considered all comments received before deciding to issue the final permit to ADM on September 23, 2014. As provided in 40 C.F.R. § 124.17, the Region prepared written responses to the comments including the comments made by Petitioner. On October 28, 2014, Petitioner filed an untimely Petition for Review. That Petition objected that EPA failed: to consult with the United States Fish and Wildlife Service ("USFWS") about endangered species; to address pore space ownership concerns; to provide reasonable access to proprietary modeling software; to require the applicant to evaluate potential air emissions impacts from well construction, drilling, completion, and injection activities; and to require ADM to retrieve continuous core of the injection zone. Petition for Review, *In re ADM.* EPA moved to dismiss the petition as untimely, and ADM moved to dismiss the petition for failure to meet the threshold filing requirements of 40 C.F.R. § 124.19(a)(3). On November 26, 2014 Petitioner filed a Notice of Voluntary Dismissal, and on that same day the Board issued its Order Dismissing Petition for Review. The

final permit to construct and operate well CCS#2 became effective on December 1, 2014, and ADM constructed and tested the well during 2015.

On November 8, 2016 EPA proposed modifications to the Class VI permit for CCS#2 and invited the public to comment on the modifications, stating: "Only the conditions proposed for modification are re-opened for comment." Petitioner twice submitted comments on the draft modification to EPA. Pet. 3-4. EPA issued the permit modification on January 19, 2017. EPA also issued a Response to Comments (RtC) addressing the public comments received on the proposed modification. (A copy of the RtC is attached to EPA's Response to the Petition). EPA responded to each of Petitioner's comments. *See* RtC at 1, 4, 12-14, 23 and 32-33. Petitioner filed the Petition with the Board on February 7, 2017. (Docket entry 1.) The Petition requests review for EPA's failure: (1) to extend the comment period for the draft modification to allow an audit of the modeling results ("Claim 1"); (2) to formally consult with the U.S. Fish and Wildlife Service ("FWS") on the draft modification ("Claim 2"); (3) to address Illinois property law issues ("Claim 3"); and (4) to provide the resources for Petitioner to reconstruct the modeling done by the ADM and EPA ("Claim 4"). The Petition failed to set forth any "contested permit conditions" of the modification pursuant to 40 C.F.R. § 124.19(a)(4)(i).

As described in more detail below, the modification fully satisfies the UIC permitting regulations, and as documented in the RtC, the Region fully responded to the issues Petitioner raised in his comments. The Region's decisions on these issues are supported by the extensive administrative record and do not require review by the Board. In addition, the Petition fails to explain why the Region's responses to Petitioner's comments for Claims 2, 3 and 4 were clearly erroneous or otherwise warrant review. The issues addressed in Claims 2 and 3 were never part of the modification and are therefore outside the scope of this proceeding. Those issues could

have been addressed only in conjunction with the original permit to construct and operate well CCS#2. In addition, the issues raised in Claims 3 and 4 constitute objections to the underlying UIC regulations and cannot be addressed in a permit proceeding. Finally, all four Claims fail on the merits. Accordingly, the Board should deny review.

IV. ARGUMENT

A. Opportunity for Public Comment Does Not Include an Opportunity to Replicate EPA's Technical Review of the Computational Modeling.

ADM combines responses to Petitioner's Claims 1 and 4 because these two claims are interrelated. Petitioner asks the Board to review and reverse EPA's decisions not to grant Petitioner additional time (Claim 1) and resources (Claim 4) to conduct a personal "audit of the modeling procedures and results." Specifically, Petitioner asserts that EPA has not:

1. "provided an extension of the comment period that would facilitate a thorough public audit of the modeling procedures and results and a full scrutiny of the administrative record." Pet at 5.
2. "provid[ed] reasonable accommodation for access to the proprietary software that forms the basis for these conclusions and for an opportunity to independently audit the modeling methodology and results." Pet. at 9.

The gravamen of Petitioner's complaint is expressed in his underlying comments on the proposed permit modifications, where Petitioner urged: "The UIC Branch of USEPA's Water Division needs to immediately adopt the practice of USEPA's Air and Radiation Division of making readily available the modeling software that is acceptable for permitting and other regulatory applications." RtC at 7. Petitioner's complaint is that EPA has taken a different policy approach to the use of models under the Class VI UIC regulations than EPA took under the Clean Air Act. That EPA policy decision, however, is unreviewable because it is completely outside the instant permit modification proceeding. EPA made that policy decision when it promulgated the final Class VI regulations on December 10, 2010. 75 Fed. Reg. 77230 (2010).

As the Board noted in *In re FutureGen Industrial Alliance, Inc.*, 16 E.A.D. __, UIC 14-68; UIC 14-69; UIC 14-70; UIC 14-71 (Consolidated), slip op. at 9 (April 28, 2015), Petitioner's "policy argument[] essentially reflect[s] disagreement with the underlying policy decisions EPA made when promulgating the Class VI regulations."

1. EPA's Modeling Approach for Class VI Permits Was Adopted by Rule and Is Not Open for Reconsideration in this Proceeding.

In promulgating the final Class VI rule, EPA stated: "EPA proposed that the AoR for Class VI wells be determined using sophisticated computational modeling" and "that any computational model that meets minimum Federal requirements and is acceptable to the Director may be used, including proprietary models." 75 Fed. Reg. at 77249. In response to this proposal, EPA noted that "[c]omments were submitted both in support of and against allowing the use of proprietary models." *Id.* In particular, EPA noted that "[c]ommenters that opposed the use of proprietary models did not believe that such models are sufficiently transparent." *Id.* Notwithstanding these comments, "EPA's final approach allows the use of proprietary models at the discretion of the Director." *Id.*

In making this policy decision to allow the use of proprietary models, EPA made clear that it will not be relying on the ability of members of the public to conduct personal audits of the modeling: "EPA does not agree with commenters who believe that the use of proprietary models will prohibit full evaluation of model results and assumptions." *Id.* Instead of relying on the ability of interested members of the public to recreate the modeling, EPA noted that "[s]everal available proprietary models meet minimum Federal requirements for use in AoR

delineation and their use has been documented in peer-reviewed research studies."[2/] For EPA to complete its review, "those using proprietary AoR delineation models, are required to disclose the code assumptions, relevant equations, and scientific basis to the satisfaction of the Director."[3/] *Id.* *See* 40 C.F.R. § 146.84(b)(1). EPA chose to rely on the collective expertise of qualified peers rather than the participation of experts in individual permitting proceedings.

2/ Following the promulgation of the Class VI well regulations, EPA issued a guidance document for use in evaluating the area of review and determining corrective action requirements for Class VI UIC permits. *See* Office of Water, U.S. EPA, EPA 816-R-13-005, Geologic Sequestration of Carbon Dioxide, Underground Injection Control (UIC) Program Class VI Well Area of Review Evaluation and Corrective Action Guidance (May 2013) ("AoR & Corrective Action Guidance")(Att. 1 to this Response). In that guidance, EPA further notes the peer reviewing of models: "A wide variety of modeling exercises have been reported in the peer-reviewed literature for GS and have been reviewed previously (Schnaar and Digiulio, 2009). Several computational codes have been developed for multiphase flow and transport problems, and a number of these codes are publicly or commercially available for the owners or operators of a GS project to use in AoR delineation modeling. Codes reported in the literature used for modeling of GS include petroleum reservoir codes (STARS, Law and Bachu, 1996; GEM, Kumar et al., 2004; ECLIPSE, Zhou et al., 2004; Juanes et al., 2006; CHEARS, Flett et al., 2007) and codes that have been developed at U.S. Department of Energy (DOE) national laboratories for a range of multiphase flow and transport problems (STOMP, CRUNCH, Knauss et al., 2005; TOUGH-series, Finsterle, 2004; Xu et al., 2006; Doughty and Pruess, 2004; Doughty, 2007)." AoR & Corrective Action Guidance at 28.

3/ 75 Fed, Reg. at 77249; *See* 40 C.F.R. § 146.84(b)(1). EPA elaborated on this approach in its AoR & Corrective Action Guidance (Attachment 1) at 29: "The use of proprietary codes (i.e., codes not available for free to the general public) may prevent full evaluation of model results (e.g., NRC, 2007). There are several aspects of a model that can be proprietary, and some may be more important than others for computational model evaluation. For example, use of a proprietary user interface with a publicly available code may not present a significant problem. Several popular codes in the petroleum-reservoir engineering discipline are proprietary (e.g., ECLIPSE). However, these codes have been used in peer-reviewed studies to model GS, and operators of particular GS sites may prefer to use these codes as they have previous experience with them. As discussed below, when using a proprietary model for AoR delineation, site operators of GS projects are encouraged to clearly disclose to the UIC Program Director the code assumptions and, if necessary, governing equations and equations of state with the permit application."

In its AoR & Corrective Action Guidance, EPA further explained: "Several [model] codes were compared for identical GS problems in an LBNL [Lawrence Berkeley National Laboratory] study (Pruess et al., 2004) in order to evaluate code comparability. Ten research groups representing six countries participated in the study. The codes evaluated included TOUGH-series codes (LBNL, CSIRO Petroleum, Industrial Research Limited), ECLIPSE 300 (Los Alamos National Laboratory), and STOMP (Pacific Northwest National Laboratory), among others. The problems considered varied in complexity and included mixture of gases in an open system, radial flow from an injection well, discharge along a fault zone, injection with mineral trapping, and injection with enhanced-oil recovery. For the most part, model results for the different codes were found to be in good agreement." AoR & Corrective Action Guidance at 28. Both the ECLIPSE model used by the permittee in reevaluating the area of review and the STOMP model used by EPA to review that reevaluation were included in that LBNL study. *See also* FutureGen at 13 ("In this case, FutureGen delineated the area of review using a computational modeling tool that is one of the methods recognized in EPA's area of review guidance.") The policy decision to allow the use of proprietary models and to adopt the approach taken in this permit modification for using computational models was made at the rulemaking stage and is not open for review in this proceeding.

2. <u>EPA's Expert Review and Approval of the Modeling Fully Meets Its Responsibility and Does Not Warrant Review.</u>

Permittee ADM conducted the reevaluation and delineation of the area of review in this case using the ECLIPSE model. As explained in EPA's response to Petitioner's comments, EPA conducted an evaluation of the Permittee's approach and:

> assessed ADM's computational approach (including the specific software used); conceptual/geologic model and its consistency with formation testing results;

> constitutive relations; model boundaries; maximum injection pressure; and all other model inputs. This assessment was conducted to ensure that the modeling effort meets the requirements of the Class VI Rule and that the model accurately reflects the available site characterization data as well as the pre-operational logging and testing results. . . . As a result of this assessment, EPA confirmed that ADM's model is based upon a reasonably constructed and applied approach."

EPA RtC at 8-9. This is similar to the approach EPA took in evaluating the modeling conducted by the permittee in *FutureGen*, where the Board noted that "the regulations neither contemplate nor require the Region to independently model the plume or its predicted movement to delineate the area of review." *FutureGen* at 14. Likewise, the regulations neither contemplate nor require EPA to allow, much less provide the resources for, members of the public to independently model the area of review. Here, as in FutureGen, "the Region conducted a thorough and independent review of [ADM's] modeling that was fully consistent with its obligations under the regulations." *FutureGen* at 15.

This is precisely the type of exercise of EPA's technical expertise and experience that the Board has referenced in noting that "[o]n matters that are fundamentally technical or scientific in nature, the Board typically will defer 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."[4/] The fact that Petitioner may have similar technical expertise, unlike other members of the public, does not entitle him to stand in the shoes of EPA or to substitute his judgement for that of the person to whom the regulations assign that responsibility. Without providing legal authority to support his demand and without a demonstration of any flaws in

---

[4/] *FutureGen* at 6, *citing In re Dominion Energy Brayton Point, LLC* ("Dominion I"), 12 E.A.D. 490, 510, 560-62, 645-47, 668, 670-74 (EAB 2006); see also, e.g., *In re Russell City Energy Ctr.*, PSD Appeal Nos. 10-01 through 10-05, slip op. at 37-41, 88 (EAB Nov. 18, 2010), 15 E.A.D. ___, *petition denied sub nom. Chabot-Las Positas Cmty. Coll. Dist. v. EPA*, 482 F. App'x 219 (9th Cir. 2012) ; *In re NE Hub Partners*, 7 E.A.D. 561, 570-71 (EAB 1998).

EPA's response, Petitioner fails to show that Board review is appropriate. "[U]nder the regulations that govern the Board's review of EPA permit decisions, a UIC permit decision will ordinarily not be reviewed unless it is based on either a clearly erroneous finding of fact or conclusion of law, or involves an important matter of policy or exercise of discretion that warrants review." *In re: Envotech, L.P. Milan, Mich.*, 6 E.A.D. 260, __ (EAB 1996).

Importantly, the Petition nowhere states that EPA made any mistakes in its evaluation of the modeling other than to fail to allow the Petitioner to conduct his own "evaluation of the modeling methodology and results." As was true in *Envotech*, the Petitioner "offer[s] no explanation as to why the migration modeling performed in connection with these permits, or the equations on which modeling was based, are inadequate, and therefore have not demonstrated that the Region erred in applying the model . . . . Review of this issue must therefore be denied." *Envotech* at 92.

The Board reiterated in *FutureGen*: "In considering whether to grant or deny review of a permit decision, the Board is guided by the preamble to the regulations authorizing appeal under part 124, in which the Agency stated that the Board's power to grant review "should be only sparingly exercised," and that "most permit conditions should be finally determined at the [permit issuer's] level." Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,412 (May 19, 1980); *see also* 78 Fed. Reg. at 5,282. *See In re City of Attleboro*, 14 E.A.D. 398, 405 (EAB 2009); *In re Environmental Disposal Sys., Inc.*, 12 E.A.D. 254, 263-64 (EAB 2005); *In re Scituate Wastewater Treatment Plant*, 12 E.A.D. 708, 717 (EAB 2006); *In re City of Moscow*, 10 E.A.D. 135, 140-41 (EAB 2001); *In re Jett Black, Inc.*, 8 E.A.D. 353, 358 (EAB 1999); *In re Maui Electric Co.*, 8 E.A.D. 1, 7 (EAB 1998). On matters that are fundamentally technical or scientific in nature, the Board will typically defer 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 City of Palmdale*, 15 E.A.D. 700, 709, (EAB 2012); *See also In re Beeland Group, LLC*, 14 E.A.D. 189, 196 (EAB 2008); *In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 510 (EAB 2006); *In re Russell City Energy Ctr.*, PSD Appeal Nos. 10-01 to 10-05, slip op. at 88 (EAB Nov. 18, 2010), 15 E.A.D. , *petition denied sub nom., Chabot-Las Positas Cnty. Coll. Dist. v. EPA*, No. 10-73870 (9th Cir. May 4, 2012); *In re Peabody W. Coal Co.*, 12 E.A.D. 22, 41, 46, 51 (EAB 2005); *In re NE Hub Partners, L.P.*, 7 E.A.D. at 570-71. This is not a situation in which the Board should grant review.

B. Review of the Land Ownership Issue Must Be Denied for Failure to Meet Threshold Requirements and for Being Outside the Scope of a UIC Permit.

1. The Petition Fails to Satisfy Threshold Requirements for Board Review.

Claim 3 of the Petition should be denied for failure to meet the threshold content requirements of 40 C.F.R. § 124.19(a)(4). Specifically, the Petition fails to comply with the threshold content requirement to "explain why the Regional Administrator's response to the comment[s] was clearly erroneous or otherwise warrants review."[5/] In addressing EPA's action on this issue, the Petition cites only the language on page 2 of the modified permit. Pet 9. The Petition cites the RtC to quote the Petitioner's comment on this issue, yet fails to explain why the

---

[5/] 40 C.F.R. § 124.19(a)(4)(ii)(*emphasis added*): "Petitioners must demonstrate, by providing specific citation to the administrative record, including the document name and page number, that each issue being raised in the petition was raised during the public comment period (including any public hearing) to the extent required by § 124.13. For each issue raised that was not raised previously, the petition must explain why such issues were not required to be raised during the public comment period as provided in § 124.13. Additionally, if the petition raises an issue that the Regional Administrator addressed in the response to comments document issued pursuant to § 124.17, then petitioner must provide a citation to the relevant comment and response and *explain why the Regional Administrator's response to the comment was clearly erroneous or otherwise warrants review*."

Region's response to that comment – also reflected in the RtC – was erroneous. EPA's response states: "EPA clarifies that property/land ownership rights, mineral rights and pore space ownership are outside the scope of this permit action and EPA's authority under the Safe Drinking Water Act." RtC 4. EPA's conclusion is supported by 40 C.F.R. § 144.35(b) and (c) which expressly excludes from UIC permitting property rights of the sort addressed by the Petitioner's comment.[6/] The Petition does not explain why EPA's conclusion that this issue is outside the scope of the UIC permit process is clearly erroneous. Nor does the Petition set forth any legal support for ignoring EPA's sound clarification of the legal basis for its response:

> Property rights issues are outside of EPA jurisdiction and are governed by legal principles other than the UIC regulations. See also 40 C.F.R. 144.35 and *In re Bear Lake Props.*, 15 E.A.D. 630 (EAB 2012), *In re Am. Soda, LLP*, 9 E.A.D. 280 (EAB 2000), and *In re Envotech, L.P.*, 6 E.A.D. 260, 286 (EAB 1996) ("[T]he SDWA ... and the UIC regulations ... establish the only criteria that EPA may use in deciding whether to grant or deny an application for a UIC permit."), *In re Columbia Gas Transmission Company*, 2 E.A.D. 347, 348 (EAB 1987) (the Region is not required to take ownership of land into account when acting on a UIC permit application).

Accordingly, the Petition fails to satisfy the threshold requirements for filing a petition for review under 40 C.F.R. Part 124 with respect to Claim 3.

2. State Property Law Issues Are Outside the Scope of the UIC Program and Unaffected by a UIC Permit.

As EPA noted in its response to Petitioner, the issue of Illinois property law that Petitioner asserts truly does fall outside the scope of the UIC program and allowable permitting considerations. These issues are explicitly excluded from the permitting process by section 144.35 (b) and (c) of the UIC regulations providing that "a permit does not convey any property

---

6/ 40 C.F.R. § 144.35(b) The issuance of a permit does not convey any property rights of any sort, or any exclusive privilege. (c) The issuance of a permit does not authorize any injury to persons or property or invasion of other private rights, or any infringement of State or local law or regulations.

rights of any sort" or "authorize any injury to persons or property or invasion of other private rights." 40 C.F.R. § 144.35(b) & c; *In re Federated Oil & Gas of Traverse City*, 6 E.A.D. 722, 726, n.4 (EAB 1997); *In re Envotech, L.P.*, 6 E.A.D. 260, 275 (EAB 1996). Consequently, Petitioner cannot show that the permit decision either is based on a clearly erroneous finding of fact or conclusion of law, or involves a matter of public policy or exercise of discretion that warrants review. 40 C.F.R. § 124.19(a). As the Board has noted, "EPA is simply not the correct forum for litigating contract- or property-law disputes." *Federated Oil & Gas of Traverse City*, 6 E.A.D. at 725-26; *see also In re Envotech, L.P.*, 6 E.A.D. at 275 ("the Board does not have the authority to consider issues raised by petitioners concerning matters that are exclusively within the State's power to regulate"). "Because the regulations make clear that issuance of a UIC permit does not implicate private property rights, these arguments are beyond the scope of the permitting process and Board review." *Envotech, L.P.*, 6 E.A.D. at 276; *Brine Disposal Well*, 4 E.A.D. 736, 741 (EAB 1993); *In re Suckla Farms, Inc.*, 4 E.A.D. 686, 695 (EAB 1993).

Furthermore, this decision to exclude property issues from UIC permitting was finalized at the time EPA first promulgated section 144.35. The Board has announced previously that it will not rule on matters that are outside the permit process. *See, e.g., In re Federated Oil & Gas of Traverse City*, 6 E.A.D. 722, 725-26 (EAB 1997). The Board has held that "a permit appeal proceeding is not the appropriate forum in which to challenge either the validity of Agency regulations or the policy judgments that underlie them." *In re City of Port St. Joe and Florida Coast Paper Co.*, 7 E.A.D. 275, 286 (EAB 1997); *see also In re Tondu Energy Co.*, 9 E.A.D. 710, 716 n.10 (2001). As was the case in Envotech, the Petition here "appear[s] to suggest that the UIC regulations or the policy judgments underlying the SDWA and the UIC program are flawed . . . . This is not, however, a forum in which such challenges may be raised." *In re*

Envotech, L.P., 6 E.A.D. 260, 270 (EAB 1996), *citing Suckla Farms*, 4 E.A.D. 686, 698, 699-700 (EAB 1993) (40 C.F.R. § 124.19 does not empower Board to entertain challenges to validity of regulations or policy judgments underlying the structure of the UIC program). The Board should deny review on Claim 3 as outside the scope of the UIC permitting process.

3. The Property Provision of the Permit Is Outside the Scope of the Modification.

Finally, review must be denied on this land ownership issue because the only condition to which the issue is relevant – the very condition in Section A on page 2 of the modified permit to which the Petition refers (Pet. 2) – was not open for public comment in the modification proceeding. When EPA issued the draft modification, the Region stated that "[o]nly the conditions proposed for modification are re-opened for comment." Fact Sheet at 1 (AR #126). In addition, EPA provided a detailed list of the proposed modifications, to which the Petition makes reference (Pet. 6). *See* Fact Sheet Attachment at 2 ("Proposed Changes to the Permit"). No changes were made to the property rights sentence in Section A on page 1 of the Permit. Because no modifications were ever proposed to the property rights provision as contained in the original permit, this issue was never open for comment in the modification proceeding and cannot be reviewed at this time because that issue is outside the scope of this permit proceeding.

C. Review of the Endangered Species Act (ESA) Issue Must Be Denied Because Claim 2 Is Outside the Scope of this Modification Proceeding.

As was true for the property provision, the issue addressed by Claim 2 regarding compliance with the ESA is outside the scope of the modification proceeding. To begin with, the Petitioner essentially agrees with EPA's response that "all well construction activities had been completed" but then argues that "[a]dverse effects would continue to be possible from ongoing permitted activities including "any planned workover, stimulation, or other well test" (see

Modified Permit, page 16), "any surface gas monitoring and/or soil gas monitoring" (see Modified Permit, page 14), any potential emergency or remedial response, and anticipated plugging of the well at the end of the injection period." Pet. 7. Yet, all of the cited provisions were left unchanged by the permit modification, and are therefore not subject to challenge at this time. With respect to the Emergency Response and Remediation Plan, no substantive changes were made to that plan, which is Attachment F to the Permit. *See* Fact Sheet Attachment at 41-42 ("Proposed Changes to Attachment F: Emergency and Remedial Response Plan"). The substitution of a new map showing the area of review does not materially change the plan because that map is included to show "[i]nfrastructure in the vicinity of the IL-ICCS project that may be impacted as a result of an emergency at the project site" rather than to limit the area within which emergency and remedial actions could occur. Permit Attachment F at 2 (Attachment 2 to this Response). The caption for Figure F-2 merely states: "Emergency & remedial response activities will *most likely* be within the "area of review" highlighted on the map." (*Emphasis added*.) Accordingly, the ESA issue was outside the scope of the modification and could only be addressed for the original permit, where Petitioner raised the issue in comments and the appeal that was withdrawn.

Moreover, the Petition fails to explain why the EPA response to Petitioner's comment on the ESA issue is clearly erroneous. In arguing that consultation with the FWS is always required, Petitioner neither disputes EPA's determination that "the proposed modifications are only administrative in nature, and the proposed modifications will not affect any listed species, or critical habitat and will only impact the permitted injection zone between 5,553 feet and 7,043 feet below the ground surface", nor addresses EPA's documentation of that finding in its memorandum that "documents this determination". AR #424. As was the case in *Seneca*

Resources, this Petition does not discuss or "explain why the [Region's] respons[es] to the comment[s] [were] clearly erroneous or otherwise warrant[] review," as required by 40 C.F.R. § 124.19(a)(4)(ii), and a long line of Board precedent. *See, e.g., In re City of Pittsfield*, NPDES Appeal No. 08-19 (EAB Mar. 4, 2009) (Order Denying Review), aff'd, 614 F.3d 7, 11-13 (1st Cir. 2010); *see also In re Knauf Fiber Glass, GmbH*, 9 E.A.D. 1, 5 (EAB 2000) ("Petitions for review may not simply repeat objections made during the comment period; instead they must demonstrate why the permitting authority's response to those objections warrants review .").[7/] Accordingly, the present Petition fails to meet the requisite standard of specificity for review on Claim 2 and fails to articulate any supportable reason or reasons as to why the permitting authority erred or why review is otherwise warranted.

V. CONCLUSION

In issuing the ADM permit modification, the Region reviewed the information submitted following construction, logging and testing of well CCS#2 and approved appropriate permit

---

7/ *Seneca Resources* at 7, n. 4: Federal circuit courts of appeal have consistently upheld the Board's threshold requirement to demonstrate, with specificity, that review is warranted, including the requirement that a petitioner must substantively confront the permit issuer's response to the petitioner' s previous objections. *See, e.g., Native Vill. of Kivalina IRA Council v. EPA*, 687 F.3d 1216, 1219 (9th Cir. 2012), *aff'g In re Teck Alaska, Inc.*, NPDES Appeal No. 10-04, at 7-11 (EAB Nov. 18, 2010); *City of Pittsfield v. EPA*, 614 F.3d 7, 11-13 (1st Cir. 2010), *aff'g In re City of Pittsfield*, NPDES Appeal No. 08-19 (EAB Mar. 4, 2009) (Order Denying Review); *Mich. Dep't of Envtl. Quality v. EPA*, 318 F.3d 705, 708 (6th Cir. 2003) ("[Petitioner] simply repackag[ing] its comments and the EPA's response as unmediated appendices to its Petition to the Board * * * does not satisfy the burden of showing entitlement to review."), *aff'g In re Wastewater Treatment Fac. of Union Twp.*, NPDES Appeal Nos. 00-26 & 00-28 (EAB Jan. 23, 2001) (Order Denying Petitions for Review); *LeBlanc v. EPA*, 310 F. App'x 770, 775 (6th Cir. 2009) (concluding that the Board correctly found petitioners to have procedurally defaulted where petitioners merely restated "grievances" without offering reasons why the permit issuer' s responses were clearly erroneous or otherwise warranted review), *aff'g In re Core Energy, LLC*, UIC Appeal No. 07-02 (EAB Dec. 19, 2007) (Order Denying Review); *see also* 78 Fed. Reg. at 5,282.

modifications, consistent with regulatory standards. The record establishes that Petitioner has not identified any clearly erroneous decisions by the Region or any policy decisions warranting review by this Board with respect to the modification. ADM therefore respectfully requests that the Petition for Review be denied.

VI. STATEMENT CONCERNING ORAL ARGUMENT

Petitioner has not requested oral argument. All of Petitioners' contentions fall short of proving any clearly erroneous finding of fact or conclusion of law, or of showing any exercise of discretion or important policy consideration requiring review. Therefore, oral argument is neither necessary nor appropriate.

VII. STATEMENT OF COMPLIANCE WITH WORD LIMITATION

Pursuant to 40 C.F.R. § 124.19(d)(3), ADM states that this Response to Petition for Review contains approximately 6,064 words, which does not exceed the 14,000 word limit set by the Board.

Respectfully submitted,

/s/ Robert F. Van Voorhees

Steven J. Murawski
Archer Daniels Midland Company
4666 Faries Parkway
Decatur, IL 62526
Phone: 217-451-7918
Fax: 217-424-6196

Robert F. Van Voorhees
Bryan Cave LLP
1155 F Street, N.W., Suite 700
Washington, D.C. 20004
Phone: 202.508.6014
Fax: 202.220.7314

Counsel for Archer Daniels Midland Company

March 8, 2017

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

In re:	)	
	)	
Archer Daniels Midland Company	)	UIC Appeal No.: 17-05
Decatur, Illinois	)	
Facility CCS#2	)	
	)	
Underground Injection Control (UIC)	)	
Permit No.: IL-115-6A-0001	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that today, March 8, 2017, the following were served on the Environmental Appeals Board via the EAB eFiling system: (1) a Response to Petition for Review; (2) a Notice of Appearance; and (3) this Certificate of Service.

I further certify that I will serve on March 9, 2017 via the United States Postal Service paper copies, of (1) the Response to Petition for Review; (2) the Notice of Appearance; and (3) this Certificate of Service that were printed from the PDF versions used in the electronic filing to the following persons and addresses:

Jeffrey Sprague
P.O. Box 442
Argenta, Illinois 62501
Telephone: 217-795-2131

Hon. Robert A. Kaplan
Acting Regional Administrator
Environmental Protection Agency
Region 5
77 West Jackson Boulevard
Mail Code: R-19J
Chicago, Illinois 60604

Andre Daugavietis
Associate Regional Counsel
United States Environmental Protection Agency
77 West Jackson Boulevard (C-14J)
Chicago, Illinois 60604

Thomas Glazer
USEPA Headquarters
Office of General Counsel
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N. W.
Mail Code: 2355A
Washington, DC 20460

Dated: March 8, 2017

/s/ Robert F. Van Voorhees
Bryan Cave LLP
1155 F Street, N.W., Suite 700
Washington, D.C. 20004
Phone: 202.508.6014
Fax: 202.220.7314
rfvanvoorhees@bryancave.com

Counsel for Archer Daniels Midland Company