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

In the Matter of:	)	
Bear Lake Properties, LLC	)	
William A. Peiffer, Jr.,	)	
Petitioner	)	Permit Appeal: UIC 11-03
and	)	
Paul T. Stroup,	)	
Petitioner	)	
UIC Permits Nos. PAS2D15BWAR and PAS2D16BWAR	)	

REGION III'S RESPONSE TO MOTION FOR PARTIAL RECONSIDERATION

The United States Environmental Protection Agency Region III (Region) hereby responds to the motion for partial reconsideration filed by Petitioner William A. Peiffer, Jr.[1] (Petitioner) on July 9, 2012. Petitioner is asking the Environmental Appeals Board (Board) to reconsider its June 28, 2012, Order concerning this case. In particular, Petitioner asks for reconsideration of section V.D. of the Order rejecting his challenge to the permits based on failure to consider population growth and possible adverse economic impact of the injections wells.

1 The initial Petition for Review was filed jointly by Mr. Peiffer and by Mr. Paul T. Stroup. The motion for partial reconsideration, however, was filed by Mr. Peiffer alone.

STANDARD OF REVIEW

Under 40 C.F.R. § 124.19(g), motions for reconsideration "must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors." The filing of a motion for reconsideration "should not be regarded as an opportunity to reargue the case in a more convincing fashion. It should only be used to bring to the attention of [the Board] clearly erroneous factual or legal conclusions." In re Hawaii Elec. Light Co., Inc., PSD Appeal Nos. 97-15 through 97 -22, at 6 (EAB Mar. 3,1999) (citing In re Arizona Municipal Storm Water NPDES Permits, NPDES Appeal No. 97 -3, at 2 (EAB Aug. 17, 1998). A party's failure to present its strongest case in the first instance does not entitle it to a second chance in the form of a motion to reconsider. See In re Knauf Fiber Glass, GmbH, PSD Appeal Nos. 99-8 through 99-72, at 3 (EAB April 10, 2000) (citing Publishers Res. Inc. v. Walker-Davis Publ'ns, Inc., 762 F.2d 557, 561(7th Cir. 1985) ("Motions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence. Such motions cannot in any case be employed as a vehicle to introduce new evidence that could have been adduced during the pendency of the [original proceeding]. * * * Nor should a motion for reconsideration serve as the occasion to tender new legal theories for the first time.")).

DISCUSSION

The Board should reject Petitioner's motion for partial reconsideration because the Petitioner failed to demonstrate error of law or fact warranting reconsideration. Rather, Petitioner's motion for reconsideration represents Petitioner's impermissible attempt to reargue the case by presenting new arguments and legal theories for the first time. Specifically, Petitioner argues for the first time that the area of review calculation in this permit was based on a fixed-radius, rather than a zone of endangering influence calculation – and that the UIC regulations at 40 C.F.R. § 146.6 require consideration of population in such fixed radius-based

calculations. Petitioner failed to raise this argument in his Petition for Review – and his general argument challenging the information on the location of drinking water wells cannot be construed to have raised this very specific argument about the basis for the area of review calculation and the factors to be considered in such calculation. As discussed below, neither did Petitioner raise this argument during the comment period, thus denying EPA an opportunity to respond. Finally, in responding to this newly-raised argument, EPA notes that the record indicates that the area of review calculation was in fact based on a zone of endangering influence calculation – not on a fixed radius-based calculation.

The Board should reject the motion for partial consideration because Petitioner failed to raise the argument concerning the area of review determination in the Petition for Review.

In this motion, Petitioner is simply attempting to reargue this case. The Board properly denied review, finding that Petitioners' concerns about population growth and potential adverse economic impact of the injections wells were beyond the scope of the UIC program. See In re Bear Lake Properties, LLC, UIC Appeal No. 11-03 (EAB June 28, 2012) ("Order") at 19. Petitioner now tries to recast his argument as a challenge to the area of review determination, arguing for the first time that it was based on a fixed radius which under the regulations would require consideration of population.[2] As the Board correctly noted in Section V.A. of the Order, Petitioner did not challenge the area of review determination in the Petition. See Order, at 8. In fact, Petitioner neither raised the argument that the area of review was in fact based on a fixed radius nor cited to the fixed-radius area of review regulation at 40 C.F.R. § 146.6(b)(2) in his

2 EPA recognizes that the UIC regulations at 146.6(b) require consideration of "population and ground-water use and dependence" in calculating area of review based on fixed-radius. However, EPA notes that consideration of "population and ground-water use and dependence" does not include consideration of the types of economic impact that Petitioners raised in their original Petition. See Petition for Review of Permit Decision, In re Bear Lake Properties LLC, UIC Appeal No. 11-03, at 11 (noting failure to consider "the economics of the area, the detrimental effect that locating these wells in Columbus Township will have on the area, and the adverse economic impact that the residents of Columbus Township will suffer as a result"). As the Board correctly noted in its decision, such economic concerns are outside the scope of the UIC program, which is "limited to the protection of underground sources of drinking water." Order, at 19.

initial Petition. Petitioner is now, through new counsel, trying to raise new arguments which he could have brought up in his Petition.

Although the Petition for Review on its face does not challenge the area of review determination, Petitioner argues that the Board should construe the argument in the Petition on the locations of drinking water wells as a challenge to the area of review determination. But the Board is not obligated to articulate and respond to an argument on behalf of the Petitioners which is not clearly presented in the Petition. "[T]he Board will not grant consideration on the merits of a permit challenge that is unacceptably vague." In re Sunoco Partners Marketing & Terminals, LP, UIC Appeal No. 05-01 (EAB June 1, 2006), at 11. It is the burden of the petitioner to demonstrate that a particular issue warrants review, not the Board's. See In re Dominion Energy Brayton Point, L.L.C. [Dominion II], 13 E.A.D. 407, 413 (2007); In re Beeland, UIC Appeal No. 08-02, (EAB Oct. 3, 2008), 14 E.A.D. ___, slip op. at 9-10. The fact that the Board noted that Petitioners had not objected to the area of review determination clearly shows that Petitioner did not meet his burden.

The motion for partial reconsideration raises a new issue of concern that was not raised during the comment period.

The motion for partial reconsideration raises an objection to the permits that not only was not brought up in the initial Petition, but which was also not raised during the comment period. A petitioner must demonstrate that the issues he or she raises in a petition to review were previously raised during the comment period. See 40 C.F.R. § 124.19(a); see also In re Weber #4-8, 11 E.A.D. 241, 244 (EAB 2003); In re Beeland Group, LLC, UIC Appeal No. 08-02, (EAB Oct. 3, 2008), slip op. at 9 ("'[I]t is not incumbent upon the Board to scour the record to determine whether an issue was properly raised below.'") (citations omitted). Issues to be reviewed on appeal must be raised "'with a reasonable degree of specificity and clarity during

the comment period,'" so that the permit issuer "'need not guess the meaning behind imprecise comments.'" In re Dominion Energy Brayton Point, L.LC. [Dominion I], 12 E.A.D. 490, 510 (EAB 2006) (citing In re Westborough, 10 E.A.D. 297, 304 (EAB 2002)). The purpose of this requirement is to ensure that EPA as the permit issuer is aware of potential problems with a draft permit and has an opportunity to address such problems before the permit becomes final. In re City of Phoenix, 9 E.A.D. 515, 526 (EAB 2000).

Neither Petitioner's comments nor comments filed by others state that the calculation was based on the fixed radius determination and therefore should have taken into account population and ground-water use and dependence. In his motion for reconsideration, Petitioner attempts to argue that comments concerning the location of nearby drinking water wells, the mechanical integrity of injection wells, or the failure to extend the area of review into New York amount to an implicit objection to the area of review determination. However, these comments are not specific enough to put EPA on notice of the legal argument now raised that it must consider population growth, ground-water use and dependence, and historical practices in the Columbus Township area in issuing this permit, because Petitioner believes the area of review to be based on a fixed-radius calculation and interprets the regulation to require such consideration. The Region did attempt to address the comments concerning the location of ground-water wells, as challenges to the accuracy of the information provided by the permit applicant[3]. However, to read such comments as Petitioner argues in his motion for reconsideration would result in raising a new issue that the Region did not have an opportunity to address before finalizing the permit.

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3 In the permit applications, the permit applicant initially submitted information concerning the location of ground-water wells within one mile of the proposed injection wells. That information is not required in the application. See 40 C.F.R.§ 144.31(E)(7) (requiring map depicting drinking water wells within a quarter mile of the facility property boundary); 40 C.F.R.§ 146.24(a)(2) (requiring map with location information for water wells within the area of review). However, because of concerns raised during the public hearing, the Region asked the permit applicant to verify the information concerning water wells within one-mile from the proposed injection wells. See 40 C.F.R. § 124.3(c) (authorizing the Regional Administrator to request additional information to clarify or supplement previously submitted information).

Petitioner erroneously asserts that the areas of review for the two permits were based on a fixed-radius determination.

Petitioner cites the information from permit applications in support of his erroneous conclusion that the areas of review for the permit were based on fixed-radius determination. Although the applications state that an area of review of a fixed radius of one quarter mile can be used for these wells, that conclusion is based on a calculation of the zone of endangering influence. See Exhs. 1 and 2, Permit Applications: Area of Review/Zone of Endangerment Analysis, at pp. 2-3; see also Exhs. 3 (Statement of Basis for Bittinger #1 draft permit), at 2 ("Bear Lake … has calculated a zone of endangering influence based on geologic conditions at the site and anticipated operational parameters."), and 4 (Statement of Basis for Bittinger #4 draft permit), at 2 ("Bear Lake … has calculated a zone of endangering influence based on geologic conditions at the site and anticipated operational parameters."). In any case, ultimately, the area of review is determined not by the permit applicant, but rather by the Region issuing the permit. See 40 C.F.R. § 146.6 (stating that the permit issuer can solicit input from the permit applicant). In this case, the Region determined the area of review not by establishing a fixed-radius using the factors listed in 146.6(b)(2), but rather by computing the zone of endangering influence based on the applicable parameters. See Exh. 5 (Responsiveness Summary to Public Comments), at 3 ("EPA conducted its own zone of endangering influence calculation to verify the calculation submitted by Bear Lake Properties, and found the calculation acceptable."). Based on the computation of the zone of endangering influence, the Region determined that a quarter mile radius would be a sufficiently protective area of review. The factors listed in 40 C.F.R. § 146.6(b), such as population, ground-water use and dependence, and historical practices in the area of review, are not required factors for determining area of review under the zone of

endangering influence method. See In re NE Hub Partners, L.P., 7 E.A.D. 561, 578-79 (EAB 1998).

CONCLUSION

In filing this motion, Petitioner is simply attempting to reargue this case by raising new factual and legal arguments. Petitioner has not met the standard for establishing a basis for reconsideration. Therefore, the motion for partial reconsideration should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I delivered a copy of the foregoing document on the date specified below, by certified mail, return receipt requested to:

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I also certify that I filed the foregoing document electronically with the Environmental Appeals Board on the same date.

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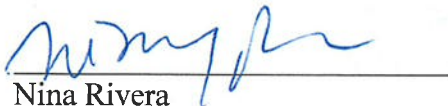

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