



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5  
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CHICAGO, IL 60604-3590

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ENVIR. APPEALS BOARD

REPLY TO THE ATTENTION OF:

October 31, 2007

C-14J

BY FEDERAL EXPRESS

Ms. Eurika Durr, Clerk of the Board  
Environmental Appeals Board  
U.S. Environmental Protection Agency  
1341 G Street, N.W., Suite 600  
Washington, D.C. 20005

Re: Core Energy, LLC (State Charleton #4-30)  
Appeal Number UIC 07-02  
Response to Petition for Review

Dear Ms. Durr:

Enclosed please find the original and five copies of the Response to Petition for filing by United States Environmental Protection Agency, Region 5 in the above referenced matter. The certified index of the administrative record requested in your October 3, 2007 correspondence is included as attachment 6. Attachments 1 through 5 are relevant portions of the administrative record referenced in the Response to Petition.

Sincerely,

A handwritten signature in black ink, appearing to read "Erik Olson", with a long horizontal flourish extending to the right.

Erik H. Olson  
Associate Regional Counsel

Enclosures

**CERTIFICATE OF SERVICE**

I hereby certify that I delivered a copy of the foregoing Response to Petition for Review and this Certificate of Service to the persons designated below, on the date below, by certified mail, return receipt requested, in an envelope addressed to:

Robert B. LeBlanc  
9300 Island Drive  
Grosse Ile, MI 48138

I have also filed the foregoing Response to Petition for Review and this Certificate of Service with the Clerk of the Environmental Appeals Board, on the date below, by Federal Express, in an envelope addressed to:

Ms. Eurika Durr, Clerk of the Board  
Environmental Appeals Board  
U.S. Environmental Protection Agency  
1341 G Street, N.W., Suite 600  
Washington, D.C. 20005

Dated this 31<sup>st</sup> day of October, 2007.



Erik H. Olson  
Associate Regional Counsel  
Office of Regional Counsel  
U.S. EPA Region 5

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

RECEIVED  
U.S. E.P.A.

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ENVIR. APPEALS BOARD

IN RE: )  
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Core Energy, LLC )  
(State Charlton #4-30) )  
Underground Injection Control (UIC) ) Appeal No. UIC 07-02  
Permit No. MI-137-5X25-0001 )  
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**RESPONSE TO PETITION FOR REVIEW**

The United States Environmental Protection Agency ("U.S. EPA"), Region 5 ("Region 5"), hereby responds to the Petition for Review filed by Mr. Robert B. LeBlanc on behalf of he and his wife, Joan S. LeBlanc, ("Petitioners") both residents of Grosse Ile, Michigan, in Appeal Number UIC 07-02.

The petition seeks review of certain terms and conditions of the federal permits issued by Region 5 to Core Energy, LLC, ("Core Energy") of Traverse City, Michigan, under the Safe Drinking Water Act ("SDWA"). For the reasons set forth below, Region 5 recommends that the Environmental Appeals Board ("EAB" or "the Board") deny the Petition for Review.

**I. INTRODUCTION**

Congress enacted the SDWA, 42 U.S.C. §§ 300f - 300j-26, in 1974 to ensure that the nation's sources of drinking water are protected against contamination. Part C of the SDWA, 42 U.S.C. §§ 300h - 300h-8, established a regulatory program "to prevent underground injection

which endangers drinking water sources.” 42 U.S.C. § 300h(b).<sup>1</sup> Among other things, the SDWA directed U.S. EPA to promulgate regulations containing minimum requirements for state underground injection control (“UIC”) programs, 42 U.S.C. § 300h, and required all states identified by U.S. EPA to submit UIC programs meeting those minimum requirements. 42 U.S.C. § 300h-1; see also 40 C.F.R. § 144.1(e) (requiring all 50 states to submit UIC programs). In states where U.S. EPA has not approved a UIC program, U.S. EPA directly implements its own regulations for the UIC program. The State of Michigan has not been approved to administer the UIC permit program; thus, U.S. EPA administers the UIC permit program within that State. 40 C.F.R. § 147.1151.

The LeBlancs’ appeal challenges Region 5’s decision to issue Core Energy a permit to operate a Class V injection well as part of a pilot carbon dioxide sequestration research project. After a thirty day public comment period on a draft permit, during which two sets of written comments were received, Region 5 issued a UIC Class V Permit to Core Energy.

The EAB received a timely Petition for Review of the permit decision from the LeBlancs on September 21, 2007, to which this document responds.

## **II. STANDARD OF REVIEW**

In order to merit review by the EAB, a petition for review:

[S]hall include a statement of the reasons supporting that review, including a demonstration that any issues being raised were raised during the public comment period (including any public hearing) to the extent required by these regulations and when appropriate, a

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<sup>1</sup> U.S. EPA regulates five classes of wells pursuant to this mandate. See 40 C.F.R. § 144.6.

showing that the condition in question is based on:

- (1) A finding of fact or conclusion of law which is clearly erroneous, or
- (2) An exercise of discretion or an important policy consideration which the Environmental Appeals Board should, in its discretion, review.

40 C.F.R. §124.19(a). The EAB interprets this provision as requiring clear identification of the conditions in the permit at issue, and argument that the conditions of the permit warrant review. *In re LCP Chemicals - New York*, 4 E.A.D. 661 (EAB 1993). Furthermore, the petitioner carries the burden of proving that issues raised in a petition for review satisfy the standards for review stated in 40 C.F.R. § 124.19(a). *In re Envotech, L.P.*, 6 E.A.D. 260, 265 (EAB 1996). Finally, the preamble to 40 C.F.R. § 124.19(a) states that the Board's discretion to review permitting actions, "should only be sparingly exercised," and that "most permit conditions should be finally determined at the Regional level." 45 Fed. Reg. 33,412 (May 19, 1980). The Board has repeatedly confirmed these preamble statements. See *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 567 (EAB 1998), citing *In re Federated Oil & Gas of Traverse City*, 6 E.A.D. 722, 725 (EAB 1997).

### **III. STATEMENT OF FACTS**

On April 16, 2007, Core Energy, LLC of Traverse City, Michigan, submitted a UIC permit application to Region 5 for review. The application and supporting documents proposed the conversion of a pre-existing stratigraphic test well in Otsego County, Michigan, to an injection well for the permanent storage, or "sequestration," of carbon dioxide (CO<sub>2</sub>).

Sequestration of CO<sub>2</sub> is one of several possible mechanisms proposed for stabilizing levels of greenhouse gases in the atmosphere and thereby mitigating climate change. The well at issue will be used to conduct research on the behavior of CO<sub>2</sub> injected into rock formations. Core Energy estimates that the injection phase of this research project will likely last 60 to 90 days and result in the injection of 10,000 metric tons of CO<sub>2</sub>. See EXECUTIVE SUMMARY, PERMIT APPLICATION.<sup>2</sup>

Following receipt of Core Energy's application and materials submitted in support of that application, Region 5 issued a draft UIC permit on July 11, 2007. Subsequently, Region 5 initiated a public comment period for the decision to issue the permit on July 12, 2007. Region 5 received two sets of comments on the draft permit, one set from Core Energy regarding several permit conditions, and another set from petitioner LeBlanc.<sup>3</sup> In their comments on the permit, the LeBlancs raised the issue of property rights of landowners under whose land CO<sub>2</sub> would be sequestered. PETITIONERS' COMMENTS, p. 4-5. On August 23, 2007, after determining that the permit met the requirements found in 40 C.F.R. Parts 144 and 146 for the protection of underground sources of drinking water and after responding to the LeBlancs' comments, Region 5 issued the final permit.<sup>4</sup>

On September 21, 2007 the Board received the LeBlancs' timely petition requesting

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<sup>2</sup>The executive summary of the permit application is included with this response as attachment 1.

<sup>3</sup>Comments Region 5 received from Core Energy and Petitioners during the comment period are included with this response as attachments 2 and 3, respectively.

<sup>4</sup>Region 5's response to Petitioners' comments is included with this response as attachment 4. The final permit is included with this response as attachment 5.

review of Region 5's decision to issue the final permit to Core Energy.<sup>5</sup> The LeBlancs' petition, in summary, argues: 1) it is unclear who is liable for any damages arising out of the permitted activity, and 2) CO<sub>2</sub> injection violates the property rights of adjacent landowners under whose land the CO<sub>2</sub> sequestration will occur.

#### **IV. RESPONSE TO ISSUES RAISED**

Petitioners' first argument is that there is no clear liability scheme that would protect parties from damages arising out of the permitted activity. Petitioners' second argument is that the permitted activity violates the property rights of nearby landowners. Petitioners' first argument was not properly raised during the public comment period and was not preserved for appeal. In addition, these issues can not be considered by Region 5 in issuing a UIC permit decision and are beyond the scope of Board review in a permit appeal.

Under U.S. EPA's regulations, only those persons who participated in the permit process leading up to the permit decision, either by filing comments on the draft permit or by participating in the public hearing, may petition the EAB to review any condition of the permit decision. 40 C.F.R. § 124.19(a). "The petition shall include a statement that the reasons supporting that review, including a demonstration that any issues being raised were raised during the public comment period to the extent required by these regulations . . ." *Id.* Although the LeBlancs submitted written comments during the comment period, as shown below, the LeBlancs did not raise in their comments on the permit the liability issue they now raise in their

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<sup>5</sup>The 30 day period during which a commenter may petition the Board to review a permit decision is extended by three days where, as here, Region 5 served the final permit decision on the commenter by mail. See ENVIRONMENTAL APPEALS BOARD, PRACTICE MANUAL (2004), p. 32.

appeal. PETITIONERS' COMMENTS.<sup>6</sup>

Furthermore, the petition filed by the LeBlancs fails to establish that EAB review of Region 5's permit decision is warranted. Both of the issues Petitioners' raise are beyond the scope of what Region 5 may consider in determining whether to issue a UIC permit, and what conditions to include therein. The permitting regulations applicable here require that the underground injection will not endanger underground sources of drinking water (USDWs), and Region 5's permit issuance decisions may only consider those facts relevant to this fairly narrow purview. 40 C.F.R. § 144.12(a). In *In re Beckman Production Services*, the Board stated: "EPA's inquiry in issuing a UIC permit is limited solely to whether the permit applicant has demonstrated that it has complied with the federal regulatory standards for issuance of the permit." *In re Beckman Production Services*, 5 E.A.D. 10, 23 (EAB 1994). Similarly, the Board's ability to review a UIC permit decision is limited to the scope of the UIC program. *In re Environmental Disposal Systems, Inc.*, 12 E.A.D. 254, 266 (EAB 2005).

The EAB views petitions from citizens unrepresented by counsel in a light most favorable to petitioners. *Beckman Prod. Servs.*, 5 E.A.D. at 19. Even under this standard, the LeBlancs' petition issues fail to represent a challenge to a particular permit condition that warrants review.

### **Response to Issue 1: Liability for Damages Arising from Injection Activity**

Under U.S. EPA's permitting regulations, not only does any person need to file comments or participate in the public hearing on a draft permit in order to be able to petition the EAB to review the permit, the person must also demonstrate that any issues being raised were raised

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<sup>6</sup>Neither was this issue raised by any other commenter.



during the public comment period as long as they were reasonably ascertainable at that time. 40 C.F.R. §§ 124.13 and 124.19(a); *See also In re City of Phoenix, Ariz.*, 9 E.A.D. 515, 524-525 (EAB 2000). Petitioners did not, however, raise any issues related to liability in their comments, and neither did any other commenter. PETITIONERS' COMMENTS; CORE ENERGY COMMENTS.

The petitioners articulate their first issue in their petition as follows:

The key issue appears to be the matter of liability (i.e., no adequate policy exists defining the roles and financial responsibilities of the industry and government). E.g., the STATE OF MICHIGAN [emphasis in original] will likely declare 11<sup>th</sup> Amendment immunity from any and all lawsuits. Also, it will be a real feat to try to collect from a Limited Liability Company (L.L.C.) such as previously described "State Actor" Core Energy, LLC or any other LLC. Maybe the EPA will shift the blame to the Department of Energy (D.O.E.) or to the Department of the Interior (D.O.I.) or even the so-called "Midwest Regional Partnership" which all might declare immunity or inability to pay any judgment for see or unforeseen damages).

PETITION, p. 1.

The LeBlancs' concerns with liability for damages arising from the permitted activity were not raised during the comment period. Issues of liability were reasonably ascertainable at the time of the public comment period. This issue, therefore, has not been preserved for review, and can not be the basis for granting a petition for review.

Even if the issue had been preserved, however, it is not a basis for granting a petition for review, since it goes beyond the scope of what the Board may consider when reviewing a UIC permit decision. The Board has opined in many decisions that the scope of its inquiry in UIC permit appeals is limited to the boundaries of the UIC program. *Environmental Disposal Systems, Inc.*, 12 E.A.D. at 266, *citing In re Am. Soda, L.L.P.*, 9 E.A.D. 280, 286 (EAB 2000) ("the SDWA and the UIC regulations authorize the Board to review UIC permitting decisions only as they affect a well's compliance with the SDWA and applicable UIC regulations"); *NE*

*Hub Partners, L.P.*, 7 E.A.D. at 567 (“protection of interests outside of the UIC program [is] beyond our authority to review in the context of [a UIC] case”), *review denied sub nom. Penn Fuel Gas, Inc. v. U.S. EPA*, 185 F.3d 862 (3d Cir. 1999); *Federated Oil & Gas*, 6 E.A.D. at 725-26.

The UIC permit has no bearing on the liability of permittee for damages arising from the injection activity. *See* 40 C.F.R. § 144.35. Rather, the permit authorizes the permittee to inject fluids under federally required minimum requirements that Region 5 has determined will prevent underground injection which endangers drinking water sources. 42 U.S.C. § 300h. The issue of who may be liable for damages caused by the injection activity is not an issue contemplated by the applicable regulations and goes beyond the scope of the Board’s authority to review.

Finally, even viewed in the light most favorable to the Petitioners, this argument does not contest any particular permit condition, as required by the Board in order to successfully appeal a UIC permit. Instead the issue goes broadly to the possible damages arising out of the permitted activity, and how aggrieved parties may or may not be made whole.

Because Petitioners’ first issue 1) was not properly raised during the public comment period, 2) goes beyond the scope of the Board’s authority to review, and 3) does not contest any particular permit condition, Region 5 respectfully requests that review be denied for this issue.

**Response to Issue 2: Permitted Activity May Violate Property Rights of Nearby Landowners**

Petitioners’ second argument raised in their petition argues that the permitted activity may violate the property rights of neighboring land owners. Petitioners state:

If the [U.S. EPA] did not issue permits until verified proof of ownership of

minerals, including but not limited to oil and gas, surface rights and formation rights then, at a minimum, neither the industry responsible for the pollution in the first place, nor the government could legally aid and abbet [sic] the theft of private property from unsuspecting American citizens.

\* \* \* \* \*

In conclusion, property owners deserve a fighting chance to protect their property against sub-surface trespasses and thus, the [U.S. EPA] via the Environment [sic] Appeals Board should professionally adopt a "proof of ownership" requirement as an initial step in submitting an application for injection for an area of review....

PETITION, p. 2-3.

The Board has consistently held that UIC permit appeals based on property rights concerns are outside the scope of its jurisdiction, and such concerns are not a valid basis for review: "[I]t is well settled that the Board may not interject itself into disputes over property rights, which are governed by legal precepts other than those contained in the SDWA and UIC regulations." *Environmental Disposal Systems, Inc.*, 12 E.A.D. at 267, citing *Federated Oil & Gas*, 6 E.A.D. at 724-26 (no jurisdiction to intervene in dispute between property owner and property lessor where lessor obtained UIC permit to operate brine injection well on leased property); *Beckman Prod. Servs.*, 5 E.A.D. at 23 (no jurisdiction to adjudicate UIC permit objections founded on pending litigation of land use conditions imposed by township); *In re Terra Energy Ltd.*, 4 E.A.D. 159, 161 (EAB 1992) (no jurisdiction to adjudicate claim of adverse effect of brine injection well on neighboring property values). The property rights issues raised by Petitioners are therefore not reviewable in this permit appeal process.

Additionally, the UIC permit explicitly does not create any property right on behalf of Core Energy. Section I(A) of the permit specifically states:

Issuance of this permit does not convey property rights of any sort or any exclusive privilege; nor does it authorize any injury to persons or property, any

invasion of other private rights, or any infringement of State or local law or regulations. Nothing in this permit shall be construed to relieve the permittee of any duties under the applicable regulations.

The UIC regulations also explicitly state that a permit may not grant any property rights. *See* 40 C.F.R. §§ 144.35(b) and 144.51(g).

Like Petitioners' liability argument, even viewed in the light most favorable to the Petitioners, the property rights argument does not contest any particular permit condition, as required by the Board in order to successfully appeal a UIC permit. Instead the issue goes broadly to the possible infringement on the property rights of nearby landowners.

Because Petitioners' second issue 1) goes beyond the scope of the Board's authority to review, and 2) does not contest any particular permit condition, Region 5 respectfully requests that review be denied for this issue.

## **V. CONCLUSION**

Appeal Number UIC 07-02 fails to present a finding of fact or conclusion of law which is clearly erroneous, an exercise of discretion or an important policy consideration which the EAB should, in its discretion, review. Therefore, Region 5 respectfully requests that the Board deny the petition for review.

Respectfully submitted,



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Erik H. Olson (*Authorized to Receive Service*)  
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Chicago, Illinois 60604  
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