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June 19, 2008

BY OVERNIGHT DELIVERY

US Environmental Protection Agency
Eurika Durr
Clerk of the Board, Environmental Appeals Board
1341 G Street, NW, Sixth Floor
Washington, DC 20005

Re: In Re: Beeland Group, LLC, Beeland Disposal Well #1, Appeal No. 08-02

Dear Ms. Durr:

Enclosed please find an original and six copies of Intervenor/Respondent Beeland Group LLC's Brief Responding to the Merits of FJR's Petition for Review No. 08-02.

Please return one file stamped copy to me in the enclosed self addressed postage paid envelope.

Thank you for your assistance.

Sincerely,

Gregory L. Berlowitz

cc: Service List

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

In Re:	)	
	)	
BEELAND GROUP, LLC	)	Appeal No. UIC 08-02
BEELAND DISPOSAL WELL #1	)	
	)	
UIC PERMIT NUMBER: MI-099-1I-0001	)	
	)	

Intervenor/Respondent Beeland Group LLC's Brief Responding
to the Merits of FJR's Petition for Review No. 08-02

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Permittee and Intervenor-Respondent Beeland Group, LLC ("Beeland"), by and through its attorneys, Mayer Brown LLP and Zimmerman, Kuhn, Darling, Boyd, Quandt and Phelps, PLC, responds to Petition 08-02 filed by Star Township, Antrim County, and Friends of the Jordan River (collectively, "Petitioners") pursuant to the Environmental Appeals Board's *Order Establishing Briefing Schedule* of May 23, 2008, as follows.

INTRODUCTION & FACTUAL BACKGROUND

In early 2007, Beeland applied to the United States Environmental Protection Agency ("EPA") for an Underground Injection Control ("UIC") permit to construct and operate a new Class I injection well in Star Township, Antrim County, Michigan. The proposed injection well is to be utilized for the underground injection and disposal of cement kiln dust (CKD) leachate collected as part of a groundwater remediation project. CKD leachate is a non-hazardous liquid created when groundwater or surface water comes into contact with CKD.

On April 12, 2007, the EPA issued a draft UIC permit for the injection well. The public comment period for the well permitting decision spanned 107 days, beginning on April 12, 2007 and ending on July 27, 2007, considerably longer than the 30-day minimum public comment period required pursuant to 40 C.F.R. § 124.10. The EPA (with the Michigan Department of Environmental Quality) held a joint public hearing on June 13, 2007, in Alba, Michigan. The EPA mailed public notices to interested parties. One hundred ninety people attended the public hearing. The EPA issued Beeland its final permit on February 7, 2008.

The Environmental Appeals Board (the "Board" or "EAB") received three petitions in response to the issuance of Beeland's UIC Permit, Petitions 08-01, 08-02 and 08-03. The Petitions were consolidated by Order of the Board, and Beeland was granted leave to intervene on March 28, 2008. On April 11, 2008, Beeland filed a Response to all three Petitions, asking

that the Board deny review on summary disposition grounds ("Beeland Response"). Replies to Beeland's Response were filed on behalf of Petitions 08-02 and 08-03. The reply to Petition 08-02 is referred to herein as the "Reply." Beeland requested and was granted leave to file a Surreply in response to issues raised for the first time in the replies ("Beeland Surreply").

On May 23, 2008, the Board denied review of Petitions 08-01 and 08-03 on summary disposition grounds, accepted Beeland's Surreply for filing and considered it as to Petition 08-03. The Board indicated that a determination as to Petition 08-02 would be made at a later date. *See In re Beeland Group, LLC,* UIC Appeal Nos. 08-01 and 08-03, slip op. at 3 (EAB, May 23, 2008) (Order Denying Review). In a subsequent Order Establishing Briefing Schedule, the Board stated that "the Board has determined that summary disposition of the petition is not appropriate at this time and believes that additional briefing on the merits of the petition will assist the Board's deliberations." *See In re Beeland Group, LLC,* UIC Appeal No. 08-02 (EAB, May 23, 2008) (Order Establishing Briefing Schedule).

Importantly, the Board did not grant review of Petition 08-02. The Order states that consistent with the Clerk of the Board's March 12, 2008 letter, which bifurcated the initial briefing into summary disposition and merits briefing,[1] the Board orders EPA and Beeland to file briefs responding to the merits of 08-02 petition by June 13, 2008. The Board subsequently granted Beeland's motion for a 7-day extension. EPA filed its brief responding to the petition on June 13, 2008 ("EPA Response"). Based on the fact that the Board has not yet granted review of Petition 08-02, Beeland is not submitting affidavits on the technical merits of the Petition.

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[1] The Letter states that "if the Board determines that summary disposition is appropriate, the Board will issue an order to that effect. If the Board determines that summary disposition is not appropriate, or that the issue of summary disposition should be reserved until after a response to the merits of the petition is filed, the Board will issue an order directing that a response to the merits of the petition be filed within 15 days of the Board's order." *In re Beeland Group, LLC,* UIC Appeal Nos. 08-01, 08-02 and 08-03 (EAB, Mar. 12, 2008) (Letter to Robert Kaplan, Region 5, Requesting Response to the Petitions for Review).

INCORPORATION BY REFERENCE

In response to EPA's Order, Beeland adopts EPA's Response as its own and incorporates by reference Beeland's Response and Beeland's Surreply as part of this brief. Beeland also submits the following additional points.

ADDITIONAL ARGUMENTS

I. Petition 08-02 Fails to Meet the Threshold Requirements

Petitioners request that the Board vacate EPA's decision to grant the permit and remand the permit to the EPA for purposes of having the EPA conduct an evidentiary hearing on the issues raised in the Petition, to reopen the public comment period, and to reconsider the final permit decision. The basis of Petitioners' claim are the following eight permit "conditions," each of which was addressed in Beeland's Response and EPA's Response:

1. The Permit conditions are not protective of the drinking water.
2. The conclusion that the Bell Shale is an impermeable confining zone is erroneous as no data to support this conclusion was submitted.
3. There is insufficient data on the quality of the injected fluids, existing reservoir conditions, and effect of the injectate on the surrounding material and fluids.
4. Waste characterization and effects of the leachate were not appropriately considered.
5. The EPA's failure to require documentation and analyze the environmental consequences and potential for adverse effects violates the SDWA and NEPA.
6. The public was not provided with all relevant information for purposes of full and fair public participation which is an inappropriate exercise of discretion by the EPA.
7. Policy considerations warrant review of the permit.
8. The EPA failed to include an analysis focused particularly on the low-income community whose water is threatened in violation of the environmental justice provisions under Executive Order 12898 and 40 C.F.R. §144.52(1)(9).

Pet. at 5.

A petition for review must contain certain fundamental information in order to justify consideration on the merits. *In Re Envotech, L.P.*, 6 E.A.D. 260, 264 (EAB 1996). The EAB has jurisdiction to review "any condition of the permit decision." 40 C.F.R. § 124.19. In order to

properly challenge such a condition, the petition must include: (1) a statement of the reasons supporting review; (2) a demonstration that the issues were raised during the public comment period; and (3) a 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). Further, this Board lacks jurisdiction to hear appeals of issues that fall outside the scope of the Safe Drinking Water Act (SDWA) and the UIC regulations. *See In Re: Core Energy, LLC*, UIC Appeal No. 07-02, slip op. at 2 (EAB Dec. 19, 2007) (Where petitioners raise concerns outside the scope of the UIC program, the Board will deny review.). As detailed in Beeland's Response and EPA's Response, Petitioners fail to meet these requirements.

First, none of the eight issues challenges a specific permit term or condition. *See* Beeland Response at 13, 15, 19, 21, 23, 25; EPA Response at 14, 17, 22-25, 26, 28; *infra* at 14-24. Rather, the issues and corresponding arguments attack the permit application and EPA technical judgments. Beeland Response at 13, 19; EPA Response at 13, 18. This Board has consistently denied review of petitions that fail to "identify any permit term or condition that they believe warrants review." *See In re Beeland Group, LLC,* UIC Appeal Nos. 08-01 and 08-03 at 4 (EAB, May 23, 2008) (Order Denying Review).

Petitioners also fail to demonstrate that many of the issues raised were preserved for appeal. Only issues "raised during the public comment period" are preserved for appeal. 40 C.F.R. § 124.19(a); 40 C.F.R. § 124.13. The Petition fails to identify <u>any</u> comment submitted during the public comment period that raises any of the contested issues. *See* Pet. *generally.* Rather, the Petitioners try to take a short cut, identifying instead EPA responses to comments as a means of showing that some of the issues were raised (no responses are identified with respect

to issues 5, 7 and 8). But, in many instances, the response and corresponding comment do not raise the concern set forth in the Petition, but rather a different point. *See, e.g.*, Beeland Response at 15-16, 20-21. This failure to preserve the eight issues for appeal mandates dismissal of the Petition. *See* Beeland Response *generally*; *infra* at 14-24; *In Re: Sierra Pacific Industries*, 11 E.A.D. 1 (EAB 2003) (dismissing petition when petitioner failed to raise issues during comment period and when petitioner's comments lacked specificity).

The failure to identify comments preserving the issues for appeal sets off a chain reaction of problems. If no comment is identified, Petitioners cannot meet their burden of demonstrating that the "conditions" in question (assuming that conditions are actually identified) are based on a finding of fact or conclusion of law which is clearly erroneous, or an exercise of discretion or an important policy consideration which the Environmental Appeals Board should, in its discretion, review.

To satisfy this burden, Petitioners must "demonstrate why the permitting authority's response to those objections warrants review." *In Re Knauf Fiber Glass, GmbH*, 8 E.A.D. 1, 5 (EAB 2000). Petitioners admit that this is the standard, yet they repeatedly fail to meet it. Pet. at 8. In attempting to show error, Petitioners just throw mud at the wall. They fail to follow the common sense approach—identifying the comment, identifying EPA's response to that comment and explaining why EPA's response is erroneous. Instead, they make blanket statements that a variety of EPA responses to comments are wrong. Most importantly, they fail to explain why the permit issuer's previous response to those objections during the comment period is clearly erroneous, an improper exercise of discretion, or otherwise warrants review. *See* Beeland Response at 14, 16, 19, 20, 21, 23, 25-27, 29, 30; EPA Response at 14, 18, 20-23, 27; *infra* at 14-24. The inherent problem with Petitioners' approach is obvious – EPA's response cannot be

erroneous when the issue was not properly raised and thus EPA was not alerted to the concern. Failure to explain why EPA's response is erroneous is fatal to Petitioner's claims. *See In Re: Massachusetts Port Authority*, NPDES Appeal No. 07-16, slip op. at 3 (EAB Sept. 19, 2007) (denying review in part because petitioner failed to identify specific permit conditions and failed to demonstrate how those conditions were based on clearly erroneous conclusions, an improper exercise of discretion or an important policy consideration warranting review.) And even when Petitioners try to explain why EPA is wrong – without tying their argument to a response to a comment as is required – they fail to identify clear error in EPA's finding of fact or conclusion of law or an abuse of discretion by EPA. *See* Beeland Response and EPA Response *generally*.

Finally, this Board lacks jurisdiction to hear Petitioners' appeal of certain issues that fall outside the narrow scope of review established for EAB review of UIC permits. "[T]he Board is only authorized to review UIC permit conditions to the extent that they affect a well's compliance with the SDWA and applicable UIC regulations. Accordingly, where petitioners raise concerns outside the scope of the UIC program, the Board will deny review." *In Re Core Energy, LLC,* UIC Appeal No. 07-02, slip op. at 3 (EAB Dec. 19, 2007); *accord In re Federated Oil & Gas of Traverse City*, 6 E.A.D. 722, 724 (EAB 1997) (holding that the Board had no authority to intervene on issues outside the permit process). Petitioners' challenges to the application, Petitioners' vague allegations regarding the administrative record, Petitioners' challenge to the siting of the well in the context of environmental justice concerns, and the CERCLA issues raised in Petitioners' Reply fall outside this Board's review authority. *See* Beeland Response at 13-14, 20, 26; Beeland Surreply; EPA Response at 19.

II. Petitioners' Challenge to EPA's Technical Decisions Is Misdirected

The Petition claims to challenge four technical decisions by EPA: (1) that the Permit conditions are not protective of the drinking water; (2) that EPA's conclusion that the Bell Shale is an impermeable confining zone is erroneous because the decision was based on no data;[2] (3) that the application failed to include sufficient data on the quality of the injected fluids, existing reservoir conditions, and the effect of the injectate on the surrounding material and fluids and thus EPA's decision on the permit was wrong; and (4) that EPA did not appropriately consider waste characterization and effects of the leachate on the reservoir. Pet. at 5. As discussed below, issue five (as it is recast in the Reply) also amounts to a technical challenge. These technical challenges demonstrate that Petitioners do not understand the scope of the permit.

In general, there are five steps in the UIC permitting process: (1) review of the application for completeness; (2) review of the application for technical sufficiency; (3) issuance of the permit with conditions (or deny permit); (4) monitoring well construction and corroborate projected field conditions and data and, if acceptable, allow operation of well; and (5) continuing to monitor well operation to ensure protectiveness. The Petition assumes that EPA has skipped ahead to the end of stage four, issuing a permit that allows operation of the well. This is not the case. EPA is at the end of stage three/beginning of stage four. EPA has only granted a permit authorizing drilling and testing of the well. As EPA explains in its Response, the permit expressly prohibits Beeland from injecting any wastewater into the well until Beeland satisfies a number of requirements, including that the Region has reviewed and approved of the data generated through the well formation testing and logging program. *See* EPA Response at 16,

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[2] The objection targets EPA's methodology, claiming that EPA makes certain assumptions about the Bell Shale without considering data at the drilling location. It does not properly challenge the ultimate fact – whether the Bell Shale is impermeable or not.

citing Permit at I.J.1, p. 12. More specifically, the permit conditions require that prior to commencing injection:

> 1. Results of the formation testing and logging program must be submitted to and approved by the Director.
> 2. Mechanical integrity of the well must be demonstrated in accordance with 40 C.F.R. § 146.8(1)(1) and (2) and Parts I(G)(1) through (3) of the Permit.
> 3. Results from ambient monitoring as required by Part II(C)(4) of the Permit must be submitted to and approved by the Director.
> 4. Required corrective action in accordance with 40 C.F.R. § 144.55(b)(2) must be completed.
> 5. Construction must be complete and a notice of completion of the construction must be submitted to the Permit Writer.
> 6. Written authorization to commence injection must be granted by the Director.

Permit at I.J.1, pp. 12-13.

In other words, Beeland must provide additional data on the geologic conditions surrounding the well, the mechanical integrity of the well and ambient monitoring in order to be able to commence injection. Since EPA will obtain more data about the site and operation of the well prior to issuing a final determination, Petitioners' challenge is misdirected. They cannot challenge EPA's final technical determinations when EPA has not made such determinations. And, importantly, Petitioners do not claim that the additional data will not provide EPA with enough information to make these final determinations. Thus, Petitioners' challenge must fail.

But even if the Petition could be construed as a challenge to decisions EPA actually made in the permitting process, namely its conditional technical conclusions (conclusions subject to further testing), Petitioners' claims still do not warrant review. That situation would be similar to *Envotech.* In *Envotech*, Petitioners challenged the Region's "preliminary conclusion (pending evaluation of data gathered during drilling and testing) that the sites . . . are 'geologically suitable' for hazardous waste injection . . . and contend that the geologic information submitted by Envotech in support of its application is inadequate or otherwise too flawed." *In Re*

Envotech, 6 E.A.D. at 284. The Board held that even if Petitioners were right and there was faulting near the well sites, review must be denied. The Board reasoned that the fact that faulting/fracturing exists near the well "does not demonstrate that the Region clearly erred by granting authorization to drill and conduct further tests designed to confirm or negate the existence of transmissive faults or fractures." *Id.* The procedural posture here is exactly the same. As in *Envotech*, EPA has only authorized drilling and further testing designed to confirm area geology. Petitioners cannot demonstrate that EPA "clearly erred" in reaching its determination.

In fact, the *Envotech* Petitioners had a much stronger case than do the Petitioners here. In *Envotech*, the Petitioners presented evidence of faulting in the area around the well. The Petitioners here rely on nothing more than speculation. Their expert even admits that he has no knowledge of the Bell Shale formation characteristics. *See* EPA Response at 17 n. 12. EPA technical determinations, issues one through five, do not warrant further review.

III. The Board Should Defer to the EPA on its Technical Decisions

Absent "compelling circumstances," the Board generally will defer to a Region's determination of issues that depend heavily upon the Region's technical expertise and experience. *In re Envotech,* 6 E.A.D. at 284. This is "particularly appropriate" where, as here, "the Region is only authorizing the Permittee to drill, construct, and test the wells." *Id.* As the Board has explained:

> [W]hen presented with technical issues, we look to determine whether the record demonstrates that the [permit issuer] duly considered the issues raised in the comments and whether the approach ultimately adopted by the [permit issuer] is rational in light of all the information in the record. If we are satisfied that the [permit issuer] gave due consideration to comments received and adopted an approach in the final permit decision that is rational and supportable, we typically will defer to the [permit issuer's]

> position. Clear error or reviewable exercise of discretion are not established simply because the petitioner presents a different opinion or alternative theory regarding a technical matter, particularly when the alternative theory is unsubstantiated.

In re: Washington Aqueduct Water Supply System, 11 E.A.D. 565, 573 (EAB, 2004).

Here, Petitioners do not allege that EPA failed to consider the issues raised in the comments or demonstrate that EPA's decision to issue a permit to drill and test the well (not inject) in light of the data available was irrational. Rather, Petitioners speculate that the geology is ill-suited to confine the injectate. This speculation will be either confirmed or denied by the required additional testing and monitoring.

The Board should defer to EPA's expertise on these technical points. *See In re Three Mountain Power, LLC*, 10 E.A.D. 39, 50 (EAB 2001) (The Board generally accords deference to permitting agencies when technical issues are concerned.); *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 403 (EAB 1997) (Petitioner carries a heavy burden when the issues at play are primarily technical).

IV. Petitioners Have Failed to Demonstrate That Policy Issues Exist Warranting Review

Comments were made during the public comment period raising environmental justice concerns. In response, EPA stated:

> To answer questions related to Environmental Justice, the EPA conducted an Environmental Justice Screening Evaluation. The Environmental Justice screening analysis indicates there are no environmental justice concerns that require further evaluation or response in the area of the proposed UIC well. In particular, the economic status of the population surrounding the proposed UIC well is comparable to that of Antrim County and of Michigan .. .

EPA Response to Comments, *Environmental Justice*, Comment 1 at 10.

Petitioners do not take issue with this response but rather claim that EPA's Environmental Justice Screening Analysis failed to focus sufficiently on "the low income

demographics" of the disposal area. Pet. at 19. Put another way, Petitioners attack EPA's method for conducting its environmental justice analysis, which is plainly not a challenge to a permit "condition."

Environmental justice concerns cannot be used by EPA to deny issuance of a UIC permit. *Envotech,* 260 E.A.D. at 280-81. At most, Petitioners' environmental justice claims could lead to a remand to the agency for further analysis. But these claims do not create a cognizable basis for remand.

Petitioners environmental justice claim must be denied on the merits. Petitioners attack EPA's methodology for conducting its analysis. They claim that a "proper evaluation would have been in terms of the community's low income demographics," arguing that

> the EPA's screening evaluation broadly reviewed the community in terms of factors where no plausible claim existed. The resulting conclusion was not relative to the community's low-income population, but diluted with other irrelevant demographics. This was an erroneous conclusion of law, resulting in an erroneous factual finding. Both warrant review.

Reply at 22.

While this statement is not entirely clear, Petitioners appear to contend that EPA did not focus on the community's income level or at least did not focus on it enough, which amounted to an erroneous conclusion of law and fact. Petitioners' claim is flat out wrong. EPA did focus on the community's income level as part of its analysis. EPA's "Environmental Justice Screening Evaluation: Alba UIC Well, September 27, 2007" ("Evaluation"), EPA Response to Comments at Appendix 1, page 47, expressly considered socio-demographic data and concluded that:

> the percent of minority and percent of people below the poverty level are at or below state-level percentages; and are comparable to county level percentages . . . this analysis does not indicate the presence of environmental justice concerns that require further evaluation or response in the area of the proposed UIC well.

Evaluation at 3, 6.

Further, EPA relied on agency guidance, known as the "Toolkit for Assessing Potential Allegations of Environmental Injustice," in performing its evaluation. See Evaluation at 1. Petitioners do not claim, nor could they, that EPA failed to follow this guidance. The record is clear that EPA considered the income level of the impacted population in its analysis and followed the relevant guidance. Thus, the Board should deny review of Petitioners' environmental justice claim.

Petitioners also fail to provide any support for their assertion that EPA's failure to focus on income demographics "was an erroneous conclusion of law, resulting in an erroneous factual finding." Reply at 22. Assuming for the sake of argument that EPA did in fact fail to consider income demographics in its analysis, Petitioners neglect to explain how such a failure would amount to an "erroneous conclusion of law." They do not point to any law detailing how EPA must conduct an environmental justice screening analysis. And, in fact, Beeland is unaware of any such law. As noted above, EPA relied on agency guidance in performing its evaluation. *See* EPA Response to Comment 1; Evaluation at 1.

The Petitioners likewise contend that EPA's flawed legal analysis led to "an erroneous factual finding." Yet, Petitioners do not claim that EPA relied on the wrong data or reached the wrong conclusion, namely that "the percent of minority and percent of people below the poverty level are at or below state-level percentages; and are comparable to county level percentages." Consequently, their argument does not withstand scrutiny.

The apparent root of Petitioners' dissatisfaction stems from Petitioners' assertion that the leachate is "being trucked from an extremely affluent subdivision to a poor rural community for disposal." Pet. at 19. In other words, the Petitioners claim that the siting of the UIC well

warrants review. This is not, however, a proper basis for review. The Board should deny review of any environmental justice-related issues.

V. Petitioners' Reply Cannot Save Their Petition

Petitioners try and salvage their Petition through their Reply brief, attempting to correct deficiencies in the Petition pointed out by Beeland in its Response. But their efforts are too late. Board review is denied when a petitioner "attempts to resuscitate its case through submittal of its reply brief," by including more technical and argumentative detail than the petitioner did in its petition. *See In re: Keene Wastewater Treatment Plant*, 2008 WL 782613 at *9, NPDES Appeal 07-18 (E.A.B., Mar. 19, 2008). Petitioners' Reply attempts to identify, for the first time, comments that Petitioners claim preserved their issues for appeal. The Reply also points out additional EPA responses to comments that Petitioners allege are erroneous (again, without linking the response to a proper comment). *Keene Wastewater* makes clear that attempts, such as these, to redo a Petition through a reply are not permitted.

Petitioners also cannot raise new issues or make new substantive arguments for the first time in their Reply. *See* Surreply; *In re: Keene Wastewater,* 2008 WL 782613 at *9-10. As the Board noted in *Keene Wastewater*, "to the extent that some of these arguments raise substantive nuances that are not set forth in the petition . . . they constitute, in essence, 'late-filed appeals' because they could have been raised in the petition but were not so raised." *Id.* at 9-10, *citing In re BP Cherry Point*, 12 E.A.D. 209, 216 n. 18 (EAB 2005) (other citations omitted). Thus, the Board should not consider any new substantive arguments, including Petitioners' attempts to reframe certain issues, presented for the first time in their Reply.

But even if the Board could consider new information submitted in a reply, the new information contained in Petitioners' Reply does not advance their claims.

1. Review Must be Denied for Petitioners' Argument that the Permit is Not Protective of the Drinking Water

Petitioners' Reply makes no effort to save issue one, referred to in the Petition as "[t]he Permit conditions are not protective of the drinking water." Petitioners apparently do not consider it to be a separate issue. Neither the Petition nor the Reply identify any comments preserving the issue or any allegedly erroneous responses by EPA. Further, Petitioners do not treat it as a separate issue in their Reply.

2. Review Must be Denied for Petitioners' Argument that EPA Failed to Base Its Assumption that the Bell Shale is an Impermeable Confining Zone on Data

The Reply claims that the issue concerning EPA's lack of data on the Bell Shale was preserved for appeal, stating that "a number of comments addressed the lack of data concerning the Bell Shale as a confining layer." Reply at 6. The Reply does not, however, quote any of these comments but rather paraphrases them. A review of each of the comments demonstrates that the issue raised by Petitioners – that no data was submitted and thus EPA did not rely on any data to support its assumption that the Bell Shale will act as an impermeable confining layer – was not preserved for appeal. None of the comments in the Reply put EPA on notice that the public was concerned with Beeland's application concerning the Bell Shale or the basis for EPA's technical judgments about the Bell Shale.

Furthermore, Petitioners inappropriately recast the issue in their Reply. The Petition states that EPA assumes the Bell Shale will act as a confining layer "without *any* evidence that this is in fact that case." Pet. at 9 (emphasis added). The Petition also claims that "[t]here is *no documentation or data* in the application for Permit to substantiate that the USDW will be protected by the Bell Shale." *Id.* (emphasis added). Beeland's Response pointed out that Petitioners were wrong and that EPA plainly considered area data to support this assumption.

See Response at 17-19. Petitioners were thus forced to concede this point in their Reply, stating that "EPA considered known regional data and some public comments" in assessing the Bell Shale. Reply at 14.

Petitioners now attempt to completely change how they characterize the issue. They state in their Reply that EPA "failed to consider any data on whether the Bell Shale *at the drilling location* would act as a confining layer."[3] Reply at 14 (emphasis added). Notwithstanding the fact they cannot raise a new issue in their Reply, this reformulation of the issue does not warrant review. As an initial matter, this is not a challenge to a permit condition or even a challenge to a decision made by EPA in the permitting process. *See supra* at 7-9. Second, Petitioners fail to cite to any authority supporting the premise of the argument – that EPA must consider data at the drilling locations. That is likely because this principle is entirely inconsistent with the permitting process. The specific characteristics of a geologic strata "at the drilling location" is estimated from surrounding wells and known regional geology during the permitting process. Actual data "at the drilling location" is not collected *until the well is actually drilled.* This is why the well must be tested before injection can commence; to ensure that the well-reasoned assumptions and calculations set forth in a permit application and the EPA's knowledge of the geology in the area of the proposed well are confirmed by actual data during the drilling and testing process.

Third, no commenter raised this issue during the public comment period. And, fourth, EPA has not had the opportunity to submit a response on this point. Consequently, Petitioners cannot meet their burden of demonstrating that the issue was preserved for appeal or that EPA's response to a comment was based on an erroneous finding of fact.

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[3] Their Reply also states that responses to comments from EPA "did not address specific studies and/or monitoring that address the concerns about increased fracturing caused by gas extraction wells and how that might increase waste mobility." But Petitioners fail to show that any such studies, assuming they exist, were brought to the attention of EPA during the public comment period and fail to point to the specific comment and corresponding response that are allegedly erroneous.

Beeland's Response cited to *Envotech* to support the proposition, reiterated above, that review of EPA's alleged failure to consider *sufficient* data in determining that a site is geologically suitable for drilling and testing only is largely inappropriate. Beeland Response at 17. The Reply attempts to distinguish *Envotech* on the basis that "the Petitioners in *Envotech* challenged that the EPA's data was *inadequate* because it was inaccurate. Here, Petitioners challenge the data's *sufficiency* because no evidence was presented to support the Permittee's claim that the Bell shale will not act as a confining layer." Reply at 14. This argument is unavailing for many reasons. First, Petitioners mischaracterize *Envotech*. *Envotech* involved a contention that "the geological information submitted by *Envotech* in support of its applications is *inadequate or otherwise too flawed* to support the Region's decision," including that the information in the application was "insufficiently detailed." *In Re Envotech,* 6 E.A.D. at 283-4. Thus, *Envotech* involved an allegation of insufficient data in addition to flawed data.

Second, it is unclear why such a distinction makes any difference. The Board denied review on the insufficient data argument because the Petitioner failed to demonstrate that additional information "would have led the Region to a different conclusion at this stage in the process." *Id.* at 285. The decision had nothing to do with the accuracy of the information.

Finally, even if the inaccurate vs. insufficient distinction mattered, it is untrue. Petitioners are wrong when they say that "no evidence was presented to support the Permittee's claim that the Bell Shale will act as a confining layer." Reply at 14. In fact, on the very same page of their Reply, Petitioners concede that EPA considered "regional data." *Id.* Additionally, Beeland's application included drilling records for the three active injection wells within two-miles of Beeland's proposed well, as well as the drilling log of an abandoned well drilled within two miles of the proposed injection well. This information clearly depicts the thickness and

extent of the Bell Shale in the immediate vicinity of Beeland's proposed well. Beeland also submitted geologic cross-sections and maps based upon data from wells drilled in the area that depict the extent and thickness of the Bell Shale, and provided projected depth summaries of the subsurface strata based upon the extensive geologic data available. Beeland's application also pointed out that the Dundee injection zone is utilized for the disposal of oilfield brines throughout Antrim County and the proposed Beeland well site is surrounded by Class II Dundee Injection wells in all compass directions. EPA relied on this information in reaching its conclusion:

> Drillers' logs and formation records from nearby wells are used to determine the geological data from both the confining zone and injection zone. The geology of Michigan is relatively consistent. Because of this, there should be no significant change in the geology between the proposed injection well and nearby disposal wells. Data generated from hundreds of wells that have been permitted by our office, together with technical studies of the geology of Michigan (i.e. the Hydrogeological Atlas of Michigan), demonstrate that the Dundee Limestone injection zone exists at that location [the injection area] and over most of the State of Michigan.

Petitioners have failed to demonstrate that this response is clearly erroneous or even that additional information from Beeland would have modified EPA's decision. Review must be denied. The Reply does not help Petitioners' claim.

3. Review Must be Denied for Petitioners' Argument that there is Insufficient Data on the Quality of the Injected Fluids, Existing Reservoir Conditions, and Effect of the Injectate on the Surrounding Material and Fluids

The third issue raised in the Petition is largely an attack on the sufficiency of the data contained in the permit application. The argument seems to be that since data "on the quality of the injected fluid, existing reservoir conditions, and effect of the injectate on the surrounding materials and fluids" in the application was lacking, EPA's response to various comments was

wrong. Reply at 17, Pet. at 11. Petitioners are putting the cart before the horse here, claiming that the responses were wrong without tying the response to a specific comment. Reply at 17, 19-20. That is because no such comment exists.

Beeland has identified one comment identified in the Reply that marginally addresses the issue. The Reply refers to a June 13, 2007 letter from Tip of the Mitt Watershed Council which states that:

> This permit application is based on minimal samples that are characterized as a representation of fluid to be injected. However, given the difference found among the various chemical parameters between seep piles, there is no true representative sample of what will be injected into the well. Sufficient sampling prior to injection should be required . . .

While this comment points out that the application is based on only a few samples, it does not request that more samples be taken *before* the decision on the permit is rendered, the issue raised in the Petition. Rather, it suggests that sampling *prior to injection* be required. Thus, the comment did not put EPA on notice that Tip of the Mitt wanted more data on the injectate prior to a permit decision. It also fails to call to EPA's attention that citizens are concerned about a lack of data concerning reservoir conditions or the effect of the injectate on the surroundings. These issues were not preserved for appeal.

Moreover, the Reply makes no attempt to explain why EPA's response to comments about the characteristics of the injectate are erroneous. As pointed out in Beeland's Response, EPA responded:

> As a part of the permit application, Beeland Group submitted four analyses of the injectate that were taken over a three month period. While there is some variability in the concentrations of some of the analytes, none of constituents are at concentrations that EPA would deem hazardous. An understanding of the fate and interactions of the fluid and the surrounding material is only required for hazardous waste disposal. Since the waste stream is non-hazardous, this is not required for this well. However, this fluid is

> currently being injected into a commercial nonhazardous disposal well (Davis 1-19) that uses the Dundee Limestone as a part of the injection zone. The Davis 1-19 has not seen any adverse reactions from disposal of Bay Harbor waste. The Agency does not anticipate any adverse reactions between the injection zone and the injectate.

EPA Response to Comments, *Geology/Watershed and other technical issues*, Response to Comment 39 at 36. This response exemplifies EPA's careful consideration of the permit application. Even though EPA was not required to assess the interaction between the injectate and the surrounding material, EPA considered this interplay in its decision. EPA relied on the fact that the Bay Harbor wastewater has not caused adverse reactions in other injection wells. Petitioners' failure to explain why this response or any other specific EPA response is wrong compels denial of review.[4] The Reply does not fix the problems identified in Beeland's Response.

4. Review Must be Denied for Petitioners' Argument that the Waste Characterization and Effects of the Leachate were not Appropriately Considered

The fourth issue attacks EPA's characterization of the waste stream as non-hazardous. One comment cited in the Reply calls into question generally that the waste is improperly characterized as non-hazardous. Reply at 9-11. In response, EPA explained as follows:

> In particular, a waste is hazardous if it is listed in 40 C.F.R. § 261.31-261.3, or if it exhibits any one of the following characteristics and is not specifically excluded from regulation as a hazardous waste in 40 C.F.R. § 261.4:
>
> Ignitability: a flash point of less than 140 °F
> Corrosivity: a pH of less than 2.0 or greater than 12.5, or corrodes steel at a rate greater than 6.35mm per year at 55 °C
> Reactivity: unstable, reacts violently with water, is sufficiently cyanide or sulfide bearing to produce toxic gas, or is capable of detonation
> Toxicity: the Toxicity Characteristic Leaching Procedure (TCLP) extract contains any of the regulated contaminants at or above the regulatory level.

[4] Review should also be denied on the basis that the issue falls outside the scope of the Board's reviewing power. See Beeland Response at 20.

* * *

> We are not aware of any basis to characterize this wastestream as anything other than non-hazardous.

EPA Response to Comments *at Geology/Watershed and other technical issues*, Response to Comment 19 at 31. Petitioners do not explain why this explanation is wrong; they simply restate their complaint. Consequently, the issue does not warrant review. *Knauf Fiber Glass,* 8 E.A.D. at 5.

Petitioners also claim that the permit does not control corrosivity adequately, explaining that "untreated CKD leachate has a pH of 12.5, making it caustic and hazardous." Pet. at 16. Their Reply does not highlight any comment questioning the permit's *ability to control corrosivity*, although comments exist stating that the leachate is corrosive. *See* EPA Response to Comments *at Geology/Watershed and other technical issues*, Response to Comment 5 at 27. The issue therefore was not properly preserved and, as explained in Beeland's Response, Petitioners make no attempt to explain why EPA's response was erroneous or an abuse of discretion. Beeland's Response at 23.

Beeland's Response pointed out that EPA explained in response to Comment 5 that the leachate would be treated before injection to lower the pH to non-caustic, non-hazardous levels. Apparently recognizing the flaw in their argument (if the leachate is not "corrosive," then the claim that the permit fails to control corrosivity has no merit), Petitioners change how they describe the issue in their Reply. Petitioners now argue that they did not mean "corrosive" as it is defined under RCRA, but corrosive in the more generic sense. They make this claim despite the fact that their Petition refers to the RCRA definition of "corrosive." *Compare* Petition at 16 (stating that leachate is corrosive because it has a pH of 12.5) *with* 40 C.F.R. 261.22(a) (defining corrosive to include aqueous waste with a pH greater than 12.5). *See also* Reply at 19.

Assuming the more generic use of the word was what they intended, the Petition certainly did not "clearly" identify the issue as is required by the regulations. See Order Denying Review of 08-01 at 4; EPA Response at 7. Further, Petitioners' concern is not justified. Petitioners argue that "there will be surface facilities at the injection site, including pipelines and tanks that will be corroded by the CKD leachate." Pet. at 16. This worry overlooks the fact that the fluid will be treated "before shipment" to the injection site and thus corrosion at the site should be a non-issue. *See* EPA Response to Comments, *Geology and Watershed*, Response to Comment 5 at 27. Moreover, the Reply fails to explain how any EPA response on this point was erroneous or an abuse of discretion. The Reply merely states that "there is a lack of data on this issue." Reply at 19. This is not a sufficient explanation. Petitioners' Reply does not remedy the deficiencies outlined in Beeland's Response on issue four.

5. Review Must be Denied for Petitioners' Argument that the EPA Failed to Require Documentation and Analyze the Environmental Consequences and Potential for Adverse Effects in Violation of the SDWA and NEPA

Issue five contends that EPA's failure to analyze certain environmental consequences associated with the permit amounted to a violation of NEPA and SDWA. When NEPA was raised in the comments, EPA responded that it conducted the equivalent of a NEPA analysis which is allowed under the law, and that the "technical review of the application indicated that all EPA requirements necessary to prevent adverse impacts are met for this proposed UIC well." EPA Response to Comments, *Monitoring and legal issues*, Response to Comment 31 at 23-24.

In their Reply, Petitioners argue for the first time that EPA's "technical review was clearly erroneous because it was not derived from any factual basis." Reply at 20. As a threshold matter, this new claim does not relate to a permit condition and therefore does not warrant Board review. Second, this argument is premised on Petitioners' misdirected challenge

to final technical decisions, decisions that have not yet been made. *Supra* at 7-9. Third, the issue was not preserved for appeal. We have found no comment attacking EPA's technical review of the application in the context of a NEPA-type analysis. And fourth, since the issue was not raised in the comments, EPA has not had an opportunity to issue any response that could possibly form the basis of Petitioners' challenge. The Reply does not change the analysis as to issue five.

6. Review Must be Denied for Petitioners' Argument that the Public was not Provided with all Relevant Information for Purposes of Full and Fair Public Participation

Issue six is unclear from the Petition and the Reply. The Petition states that EPA must issue a response to comments and that EPA must base the permit decision on a complete administrative record. Pet. at 17. The Petition then makes the vague assertion that certain responses to comments are erroneous for the reasons set forth in Section B (issue five). Despite Beeland pointing out this vagueness in its Response, Petitioners did not attempt to clarify the argument in their Reply. As this issue is undefined and unspecific, it fails to challenge a permit condition, it was not preserved for appeal, and it falls outside the scope of review authorized for a UIC permit proceeding. *See also* Beeland Response at 26. Petitioners also have failed to demonstrate that this challenge is based on a clearly erroneous factual or legal error or presents an exercise of discretion warranting Board review.

7. Review Must be Denied on Petitioners' Argument that Policy Considerations Warrant the Board's Discretion To Remand

Petitioners' Reply does not address issue seven, the fact that no evidentiary hearing was held. Further, it is unclear how a failure to hold an evidentiary hearing that is not required under the regulations amounts to a policy consideration warranting review.

As to issue eight, the claim that EPA improperly conducted its environmental justice screening analysis, the Reply does little except attempt to flesh out Petitioners' argument. The Reply states as follows:

> EPA's screening evaluation broadly reviewed the community in terms of factors where no plausible claim existed. The resulting conclusion was not relative to the community's low-income population, but diluted with other irrelevant demographics. This was an erroneous conclusion of law, resulting in an erroneous factual finding. Both warrant review by this Board.

Reply at 22.

This somewhat cryptic explanation has no effect on Beeland's conclusion that Petitioners have failed to demonstrate that environmental justice concerns warrant review. *See* EPA Brief at 27; Beeland Response at 30; *supra* at 10-13.

8. Review Must be Denied on Petitioners' CERCLA Concerns

For the first time in their Reply, Petitioners argue that the permit should be denied because the UIC well "is part of a CERCLA Removal Action and not a separate/independent permitting activity."

> As previously stated, Regional UIC personnel do not associate the installation of the UIC well with the ongoing CERCLA removal action, that that action is only partly underway, and final remedies for all areas under investigation have not been selected. Knowledge of the well's role in the CERCLA process likely would have impacted proposed permit conditions, including proposed term of permit, monitoring and sampling requirements.

Reply at 18.

With respect to CERCLA, they also claim in their Reply that: (1) "EPA refused to respond to comments on the draft UIC permit for a number of concerns by stating those issues fell outside the jurisdiction of the UIC program," but that "those concerns are not outside of the CERCLA decision process;" (2) "CERCLA regulations provide some flexibility for onsite disposal/management of remediation waste;" and (3) "removal actions must be consistent with

the final remedial action at a site" and since an RI/FS has not been completed for all areas of concern, "it is premature to determine underground injection of leachate is consistent with the final remedy." Reply at 21 -23.

These very same issues were raised by the reply brief submitted on behalf of Petition 08-03. *See In re Beeland Group, LLC,* UIC Appeal Nos. 08-01 and 08-03, slip op. at 9 (EAB, May 23, 2008) (Order Denying Review). Beeland responded to these CERCLA arguments raised in 08-02 and 08-03 in its Surreply by pointing out that the CERCLA concerns: (1) were not raised in a timely fashion; (2) failed to meet the fundamental threshold requirements; and (3) fell outside the scope of this Board's review authority. *See* Beeland's Surreply. This Board responded by denying review of the CERCLA issues raised in 08-03, holding that "to the extent that Petition No. 08-03 was intending to raise issues concerning any ongoing CERCLA removal action, such issues would be beyond the scope of a petition for review of this UIC permit." *See In re Beeland Group, LLC,* UIC Appeal Nos. 08-01 and 08-03, slip op. at n.12 (EAB, May 23, 2008) (Order Denying Review).

The Board reserved ruling on all issues raised in 08-02 until briefing on the merits was completed. Since the CERCLA issues raised in 08-03 and those raised in 08-02 are exactly the same, the reasoning contained in the order denying review of the CERCLA issues in 08-03 applies equally to Petition 08-02. Thus, the Board likewise should deny review of the CERCLA issues raised by Petition 08-02.

CONCLUSION

It is well established that a permitting authority's inquiry in issuing a UIC permit is limited solely to whether the permit applicant has demonstrated compliance with federal regulatory standards for the issuance of the permit. Beeland has made this demonstration to the

satisfaction of the EPA. EPA has determined that Beeland has met all of the criteria required for issuance of the permit pursuant to EPA regulations at 40 C.F.R. Parts 144 and 146. For the reasons discussed above and for those articulated in Beeland's Response, Beeland's Surreply and EPA's Response, Beeland requests that the Board deny review of Petitioner 08-02 in its entirety.

Respectfully Submitted:

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Dated: June 19, 2008

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **Intervenor/Respondent Beeland Group LLC's Brief Responding to the Merits of FJR's Petition for Review No. 08-02** were served by United States First Class Mail on the following persons, this 19th day of June, 2008:

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I have also filed the foregoing **Intervenor/Respondent Beeland Group LLC's Brief Responding to the Merits of FJR's Petition for Review No. 08-02** and this **Certificate of Service** with the Clerk of the Environmental Appeals Board, by overnight delivery service, on this 19th day of June, 2008 to:

U.S. Environmental Protection Agency
Clerk of the Board, Environmental Appeals Board
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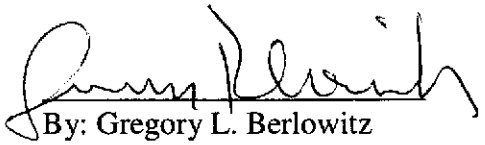

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