IN RE PUNA GEOTHERMAL VENTURE

UIC Appeal Nos. 99-2, 99-2A, 99-2B, 99-3, 99-4 & 99-5

ORDER DENYING REVIEW IN PART AND REMANDING IN PART

Decided June 27, 2000

Syllabus

The Board has consolidated six petitions seeking review of an Underground Injection Control ("UIC") permit issued by United States Environmental Protection Agency Region IX ("Region") to Puna Geothermal Venture ("PGV") and COSI Puna, Inc., pursuant to the Safe Drinking Water Act ("SDWA"), as amended, 42 U.S.C. §§ 300f — 300j-26. Petitions for review have been filed with the Board by PGV (Appeal No. 99-2), Friends of the Red Road (Appeal No. 99-2A), Gail MacKenzie (Appeal No. 99-2B), Adrian Barber (Appeal No. 99-3), Michael T. Hyson (Appeal No. 99-4), and Puna Outdoor Circle (Appeal No. 99-5).

PGV operates a geothermal power plant in Pahoa, Hawaii. Geothermal steam from the production wells is used to turn turbines to produce electricity. Condensed steam, brine, and non-condensible gases from the production wells are then disposed of into the same subsurface formation from which they were removed. Since beginning operation, PGV has, with the consent of Region IX, operated under a State-issued permit. Although the Region directly administers the UIC program in Hawaii, it initially determined that a federal permit for geothermal injection operations would not be required unless the State of Hawaii did not appear to be adequately regulating such facilities. On June 10, 1996, the Region notified PGV that the Region would require a federal permit for continued operation of the facility. PGV submitted a permit application on July 30, 1996. The Region issued a draft permit on March 3, 1998, and allowed public comment until June 23, 1998. The final permit was issued on June 16, 1999. These petitions followed.

The parties raise numerous issues allegedly supporting Board review. These include: 1) the Region erred in requiring PGV to obtain a federal permit; 2) assuming issuance of a permit was appropriate, EPA erred in requiring an individual rather than an area permit; 3) the Region erred in imposing permit conditions unrelated to the protection of an underground source of drinking water ("USDW"); 4) certain permit provisions are so vague as to be void; 5) certain conditions are clearly erroneous because it is impossible to comply with them; 6) certain conditions violate SDWA § 300j-4 (Records and inspections) and 40 C.F.R. § 144.5 (Confidentiality of information); and 7) certain provisions contain typographical and other errors and must be revised.

Held:

(1) The Region had the authority to require PGV to apply for a permit. In this regard, the Board concludes: (a) The aquifer underlying the facility meets the definition of a USDW at 40 C.F.R. § 144.3, and is therefore entitled to protection under the SDWA and its implementing regulations. The Board rejects PGV's assertion that in order to establish the existence of a USDW, the Region must identify a specific public water system that the USDW could supply; and (2) Although Class V injection wells, such as those at issue in this case, are authorized by rule under 40 C.F.R. § 144.24, the Region may, under certain circumstances, require the owner or operator of such wells to obtain a permit. In the present case, the Region had the authority to require a permit under 40 C.F.R. § 144.25 which allows the EPA to issue a permit where "[t]he protection of USDWs requires that the injection operation be regulated by requirements * * * which are not contained in the rule."

(2) The Region did not abuse its discretion in issuing an individual rather than an area permit. Nothing in the regulations requires the Region to issue an area permit. Rather, under 40 C.F.R. § 144.33, the decision whether to issue an individual or area permit is left to the discretion of the Region. The Board finds nothing unreasonable in the Region's determination in this case.

(3) The permit is remanded. On remand, the Region is ordered to incorporate those permit changes it has agreed to in its response to PGV's petition. In addition, the Region is ordered to provide a sufficient rationale for inclusion of the following conditions or remove them from the permit: Condition II.A.2.a (600-foot setback requirement), Condition II.B.1.d. (emergency response plan), II.B.1.e. (notification of emergency responders), II.E.11. (additional monitoring and reporting), II.F.2. (plugging and abandonment plan), and III.E.13. (notification of non-permitted releases). Unless the Region decides to remove these conditions (or the offending portions of these conditions) from the permit, the Region must accept and respond to public comments on its decision to retain these conditions. Any party who participates in the remand process with regard to these permit conditions and is not satisfied with the Region's decision on remand, may file an appeal (limited to these issues) with the Board pursuant to 40 C.F.R. § 124.19.

(4) The petitions filed by Gail Mackenzie (appeal no. 99-2B) and Adrian Barber (appeal no. 99-3) are dismissed as untimely.

(5) On all other issues raised by the various petitioners, review is denied.

Before Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge McCallum:

I. *BACKGROUND*

We have consolidated six petitions seeking review of an Underground Injection Control ("UIC") permit issued by United States Environmental Protection Agency Region IX ("Region") to Puna Geothermal Venture ("PGV") and COSI Puna, Inc., pursuant to the Safe Drinking Water Act ("SDWA"), as amended,

42 U.S.C. §§ 300f — 300j-26. Petitions for review have been filed with the Board by PGV (Appeal No. 99-2), Friends of the Red Road (Appeal No. 99-2A), Gail MacKenzie (Appeal No. 99-2B), Adrian Barber (Appeal No. 99-3), Michael T. Hyson (Appeal No. 99-4), and Puna Outdoor Circle (Appeal No. 99-5). At the Board's request, the Region filed responses to the petitions,[1] along with relevant portions of the administrative record and an index to the entire administrative record.[2] PGV has also filed a reply to the Region's response to PGV's petition.[3]

PGV operates a geothermal power plant in Pahoa, Hawaii. PGV commenced operation of the plant in 1993 with two production wells and three injection wells. Geothermal steam from the production wells is used to turn turbines to produce electricity. Condensed steam, brine, and non-condensible gases from the production wells are then disposed of through the three injection wells into the same subsurface formation from which they were removed. Region's PGV Response at 5. A small quantity of other fluids (supplemental water, anti-corrosion, and anti-scaling chemicals) is also disposed of in this manner. *Id*. Since beginning operation, PGV has, with the consent of Region IX, operated under a State-issued permit. Although the Agency directly administers the UIC program in Hawaii (*see* 40 C.F.R. § 147.600-601), the Region initially determined that a federal permit for geothermal injection operations would not be required unless the State of Hawaii did not appear to be adequately regulating such facilities.[4] Region's PGV Response at 6.

On June 10, 1996, the Region notified PGV that the Region would require a federal permit for continued operation of the facility. *See* Letter from Region IX, to PGV (June 10, 1996), AR 100696. The Region stated, in part:

> To date, your facility has been authorized to inject under a general U.S. Environmental Protection Agency regulation that makes federal permits optional for Class V wells. However, pursuant to 40 C.F.R.

---

[1] Response to Petition, Puna Geothermal Venture, Appeal Number: UIC 99-2 (Oct. 8, 1999) ("Region's PGV Response"); Response to Petition and Excerpts of Record, Puna Geothermal Venture, Appeal Numbers: UIC 99-3, UIC 99-4, UIC 99-5 (October 8, 1999); Responses to Petitions for Review: Appeal Nos. 99-2A and 99-2B (April 14, 2000).

[2] The Administrative Record has been consecutively numbered and will be cited as "AR" along with the appropriate page number.

[3] Puna Geothermal Venture's Reply to Region IX's Response to Petition for Review (Oct. 10, 1999) ("PGV Reply"). Puna has also filed a motion requesting dismissal of the appeals filed by Friends of the Red Road (Appeal No. 99-2A) and Gail MacKenzie (Appeal No. 99-2B). Motion to Dismiss Petitions for Review Filed by Gail MacKenzie and Friends of the Red Road (Athena Peanut).

[4] Under 40 C.F.R. § 144.24, Class V injection wells such as PGV's are authorized by rule. Under certain circumstances, however, the Agency may require the owner or operator of a Class V well authorized by rule to apply for a permit. *See* 40 C.F.R. §§ 144.25(a) and 144.12 (c)-(d).

> sections 144.12(c)(1) and 144.25(a), we are now requiring operators of wells used for the disposal of geothermal fluids in Hawaii to apply for a federal UIC permit because the historical use of geothermal injection wells has shown that this type of well can endanger Underground Sources of Drinking Water (USDW). A permit is also necessary for such actions as operations, testing, monitoring, reporting, and corrective action which are not contained in authorization by rule.

Id. PGV submitted a permit application on July 30, 1996, for the three existing injection wells and an unspecified number of additional wells to be added to the facility. Region's PGV Response at 12. The Region issued a draft permit on March 3, 1998, and allowed public comment until June 23, 1998. The final permit was issued on June 16, 1999. These petitions followed.

II. *DISCUSSION*

Under the rules governing this proceeding, a UIC permit decision will ordinarily not be reviewed unless it is based on a clearly erroneous finding of fact or conclusion of law, or involves an important matter of policy or exercise of discretion that warrants review. 40 C.F.R. § 124.19(a). As the Board has stated on numerous occasions, the Board's power of review should be "sparingly exercised" and "most permit conditions should be finally determined at the Regional level." *In re Jett Black, Inc.*, 8 E.A.D. 353, 358 (EAB 1999) (quoting 45 Fed. Reg. 33,290, 33,412 (May 19, 1980)). The burden of demonstrating that review is warranted rests with the petitioner who challenges the Region's permit decision or the conditions contained in the permit. *See* 40 C.F.R. § 124.19(a); *In re Environmental Disposal Sys., Inc.*, 8 E.A.D. 23, 25 (EAB 1999).

A. *PGV Petition*

PGV's petition raises numerous issues allegedly supporting Board review. These issues can be summarized as follows: 1) the Region erred in requiring PGV to obtain a federal permit; 2) assuming issuance of a permit was appropriate, EPA erred in requiring an individual rather than an area permit; 3) the Region erred in imposing permit conditions unrelated to the protection of an underground source of drinking water ("USDW"); 4) certain permit provisions are so vague as to be void; 5) certain conditions are clearly erroneous because it is impossible to comply with them; 6) certain conditions violate SDWA § 300j-4 (Records and inspections) and 40 C.F.R. § 144.5 (Confidentiality of information); and 7) certain provisions contain typographical and other errors and must be revised. Each of these issues will be discussed below.

1. *Region's Authority to Require a Permit*

PGV argues that the Region lacked the authority under the SDWA and its implementing regulations at 40 C.F.R. part 144 to require PGV to obtain a federal permit in this case. Petition for Review of a Final Permit Issued by the Environmental Protection Agency Region IX ("PGV Petition") at 4. PGV argues that the Region was without authority to issue an individual permit because the Region failed to established a jurisdictional foundation for requiring a permit, namely, the existence of a USDW that supplies or may be reasonably expected to supply a public water system. *Id*. at 7, 9. PGV also argues that the permit improperly regulates production wells rather than injection wells.

As a preliminary matter, although PGV frames its argument in terms of the Region's alleged failure to establish a jurisdictional basis for requiring a permit application, the issue before the Board at this juncture is the threshold issue of whether Board review of the jurisdictional issue is warranted. The burden of demonstrating the appropriateness of Board review of this issue clearly rests with PGV.

a. *USDW Issue*

PGV argues that the Region has failed to establish that the aquifer underlying the facility meets the statutory definition of a USDW, and therefore the Region lacked the authority to issue a permit in this case. PGV asserts that before an aquifer can be considered a USDW entitled to protection under the SDWA, the statute requires a showing that the aquifer "can be reasonably expected to supply any public water system."[5] According to PGV, the Agency has failed to establish the existence of a public water system that could be supplied by the aquifer. PGV states further that the quality of the water is poor and there is a "low likelihood" that the aquifer will ever be used to supply drinking water. PGV petition at 10-11. For the following two reasons, PGV has failed to convince us that review is warranted.

First, although PGV is correct that the SDWA includes the term "public water system" in defining when underground injection endangers a source of drinking water, nothing in the statute requires that the Agency identify a specific public water system. On the contrary, the statute states that underground injection endangers a drinking water source if injection could result in the presence of any contaminant "in underground water which supplies or can reasonably be expected

[5] PGV cites to SDWA § 300h(d)(2), which states, in part, that "[u]nderground injection endangers drinking water sources if such injection may result in the presence in underground water which supplies or can be reasonably expected to supply any public water system of any contaminant * * *." 42 U.S.C. § 300(h)(d)(2).

to supply *any* public water system." SDWA § 300h(d)(2) (emphasis added). Use of the term "any" indicates that Congress did not intend to extend protection only to those drinking water sources associated with a specific public water system, but sought to protect USDWs of sufficient quality such that they could potentially supply any system meeting the definition of a "public water system."[6] A drinking water source is of sufficient quality and quantity to supply a public water system if the source meets the definition of USDW at 40 C.F.R. § 144.3. Because, as discussed below, the aquifer at issue in this case meets this definition, the Region appropriately considered it a USDW entitled to protection under the Act. *See* 40 C.F.R. § 144.7(a) (any aquifer meeting the definition in section 144.3 is a USDW). PGV's arguments to the contrary are therefore rejected.

Where the Agency determines that an aquifer that otherwise meets the definition of a USDW has no real potential to be used as a drinking water source, the Agency may designate such an aquifer as an "exempted aquifer." *See* 40 C.F.R. §§ 144.7 (Identification of underground sources of drinking water and exempted aquifers) and 146.4 (Criteria for exempted aquifers). Under such circumstances, the aquifer would not be considered a USDW. 40 C.F.R. § 144.1(g). As no such designation has been made in the present case, the aquifer underlying the PGV facility must be considered a USDW. *Id*. ("No aquifer is an 'exempted aquifer' until it has been affirmatively designated under the procedures in 144.7.").

And second, what PGV fails to recognize is that in the regulatory definition of a USDW at 40 C.F.R. § 144.3, the Agency has established criteria for determining when an aquifer may be reasonably expected to supply a public water system. Under the regulations, an underground source of drinking water is defined as:

> [A]n aquifer or its portion:
>
> (a)(1) Which supplies any public water system; *or*
> *(2) Which contains a sufficient quantity of ground water to supply a public water system; and*
> (i) Currently supplies drinking water for human consumption; *or*
> *(ii) Contains fewer than 10,000 mg/l total dissolved solids;* and
> (b) Which is not an exempted aquifer.

---

[6] The statute defines "public water system" as:

> [A] system for the provision to the public of water for human consumption through pipes or other constructed conveyances, if such system has at least fifteen service connections or regularly serves at least twenty-five individuals.

SDWA § 300f(4)(A).

40 C.F.R. § 144.3 (emphasis added). As this definition makes clear, an aquifer may be considered a protected USDW if the aquifer is of sufficient quality and quantity such that it could potentially supply a public water system. Thus, consistent with the statutory language discussed above, an aquifer that does not currently supply a public water system and does not currently supply drinking water for human consumption may nevertheless be a USDW if it contains a sufficient quantity of ground water to supply a public water system and contains fewer than 10,000 mg/l of total dissolved solids. The Region argues, and PGV does not dispute, that the aquifer meets these requirements. Indeed, PGV itself seems to acknowledge that the aquifer might technically meet the regulatory definition of a USDW (PGV Petition at 11). Thus, the aquifer underlying the facility meets the regulatory definition of a USDW.[7]

b. *Permitting Decision*

PGV argues that even if a USDW exists, the Region's decision to require a permit was clearly erroneous and an abuse of discretion. In particular, PGV states:

> Taking into account the low risk of contamination posed by geothermal injection wells generally, PGV's demonstrated history of effective operating and monitoring programs, the fact that the aquifer is unlikely ever to supply drinking water, and the extensive regulatory controls already imposed by [the State of Hawaii], the Region has articulated no factually-supported reason to require PGV to obtain a federal permit.

PGV Petition at 23. We disagree.

As held in a prior Agency decision, a Region's decision to require the owner or operator of a Class V well to apply for a permit is a matter committed to the sound discretion of the Region. *In re Pontiki Coal Corp.*, 3 E.A.D. 572, 576 (Adm'r 1991). Absent compelling evidence that the Region abused its discretion in this regard, we will not disturb the Region's determination. Upon review, PGV has failed to convince us that review is necessary.[8]

---

[7] To the extent that PGV seeks to challenge the regulations defining a USDW, we decline to consider such a challenge in the context of this permit appeal. *See In re Woodkiln, Inc.*, 7 E.A.D. 254, 269 (EAB 1997); *In re Suckla Farms, Inc.*, 4 E.A.D. 686, 698 (EAB 1993).

[8] As a preliminary matter, we note that in support of the argument that a permit is not necessary, PGV cites to various statements by EPA indicating that geothermal wells generally present a moderate to low risk of contamination. PGV Petition at 13. While this may be correct, the issue in this case is not the risk posed by geothermal facilities nationwide, but whether the Region erred in determining that PGV's facility in particular should be permitted. Thus, EPA's characterization of geothermal facilities in general is of limited significance in this matter. *See Pontiki Coal*, 3 E.A.D. at 577 (the

Continued

In requiring PGV to submit a permit application, the Agency relied on 40 C.F.R. §§ 144.25 and 144.12. Section 144.25 authorizes the Agency to require the operator of a Class V well to apply for an individual or area permit. This section states, in part:

> Cases where individual or area UIC permits may be required include:
>
> * * * * * * *
>
> (3) The protection of USDWs requires that the injection operation be regulated by requirements, such as for corrective action, monitoring and reporting, or operation, which are not contained in the rule.

40 C.F.R. § 144.25(a)(3). Section 144.12 states, in part:

> (c) For Class V wells, if at any time the Director learns that a Class V well may cause a violation of primary drinking water regulations under 40 C.F.R. part 142, he or she shall:
>
> (1) Require the injector to obtain an individual permit[.]
>
> * * * * * * *
>
> (d) Whenever the Director learns that a Class V well may be otherwise adversely affecting the health of persons, he or she may prescribe such actions as may be necessary to prevent the adverse effect, including any action authorized under paragraph (c) of this section.

40 C.F.R. §§ 144.12(c) & (d).

The Region asserts that its permitting decision was justified under both 40 C.F.R. §§ 144.25 and 144.12. In particular, the Region states:

> Authorization by rule of a Class V injection well only requires the owner or operator of an injection well to inventory the well (40 C.F.R. § 144.26) and not endanger USDWs (40 C.F.R. § 144.12). In the case of PGV, EPA has determined that to protect the USDW, and ultimately human health and the environment, additional conditions are necessary. These conditions include: requiring financial assurance for

---

(continued)
ranking of certain types of wells in EPA's national scheme of priorities is of no significance in determining whether the Region committed clear error or abused its discretion in requiring an individual facility containing such wells to apply for a permit).

> the actual costs of plugging and abandoning wells; providing EPA with sufficient notice so that a representative can witness mechanical integrity tests (MIT); providing a UIC contingency plan; notification of upset conditions; and injectate and ground water monitoring.

A Response to Comments on the Federal Draft Underground Injection Control Permit to Puna Geothermal Venture and COSI (Constellation Operating Services Inc.) Puna Inc. June 1999 ("Response to Comments") at ¶ 2.e. Further, the Region argues that a permit is necessary for the following two additional reasons: (1) the risk of blowouts (the uncontrolled release of steam and brine) when drilling injections wells. The Region points out that in 1991, two blowouts occurred at the PGV facility during the drilling of injection wells that may have resulted in contaminants reaching ground water. The Region states that "PGV's plans to drill new injection wells present the possibility of future blowouts and possible impacts to the USDW." Region's PGV Response at 13; and (2) the detection of corrosion damage and a casing leak in a PGV injection well in 1992 and the possibility of a loss of mechanical integrity in the future due to ongoing corrosion. *Id*. at 14; *see also* Response to Comments at ¶ 2.a.

We need not address all of the Region's arguments in support of its permitting decision. That is, because we believe the Region's concerns regarding prior blowouts at the PGV facility and the failure of the State-issued permit to require adequate financial assurances for shutting and abandoning injection wells provide sufficient support for requiring a permit application, we need not address the Region's other arguments. While PGV is, of course, free, and in fact does, object to the need for and/or the content of individual permit conditions, these objections do not convince us that the Region's decision to require submission of a permit application was unreasonable.

According to the record before us, in February of 1991, a blowout occurred during the drilling of an injection well designated as well KS-7. *See* AR-100258, 200113; Region's PGV Response at 6. In June of the same year a blowout occurred during the drilling of another well, designated as KS-8. According to a technical evaluation of the cause of the KS-8 blowout:

> [T]he blowout occurred because of inadequacies in PGV's drilling plan and procedures and not as a result of unusual or unmanageable subsurface geologic or hydrologic conditions. While the geothermal resource in the area being drilled is relatively hot, the temperatures are not excessive for modern technology and methods to control. Fluid pressures encountered are also manageable if proper procedures are followed and the appropriate equipment is utilized.
>
> A previous blowout of short duration occurred on February 21, 1991, at the KS-7 injection well being drilled by PGV at a depth of

> approximately 1600'. The unexpected incident alerted PGV to the possibility of encountering a high temperature, fractured zone at a relatively shallow depth. The experience at KS-7 prompted PGV to refine its hydrological model; however, the drilling plan used for KS-8 was not changed.
>
> Not only did PGV fail to modify its drilling program following the KS-7 blowout, but they also failed to heed numerous "red flags" * * * in the five days preceding the KS-8 blowout * * *.

AR-100258. The Region cites to evidence in the record suggesting that these blowouts[9] may have resulted in contaminants entering the USDW.[10] Region's PGV Response at 6-7. For example, a study prepared by the U.S. Geological Survey in 1994 stated, in part:

> Chloride concentrations and Cl/Mg ratios measured in downhole samples collected in 1991 and 1992 from [monitoring] well MW2 show increases from about 500 to 1,100 mg/L and 30 to 100 mg/L, respectively * * *. Variations in chloride of this magnitude are observed in other wells * * * but no consistent trends exist. Downhole temperatures measure on a daily basis in MW2 rose and fell by about 7^0C in June 1991; subsequent, but less frequent, measurements indicate a long-term increase of about 10^0C through 1992 * * *. The timing of these changes of MW2 and the proximity of this well to KS 8 (1,000 ft away) indicate a possible relation between the MW2 chemical changes and the blowout of KS 8 in June 1991.

Potential Effects of the Hawaii Geothermal Project on Ground-Water Resources on the Island of Hawaii, U.S. Geological Survey (1994), AR 100529, 100564. Under these circumstances, we conclude that the Region did not abuse its discretion in determining that the drilling and operation of up to seven new Class V

---

[9] We note that PGV denies that the incident involving well KS-7 was a "blowout." Rather, PGV asserts that this "blowout" was actually a "brief steam 'kick' which resulted in a momentary release of steam (unlike the longer 'blowout' at KS-08)." PGV Petition at 25. However, because an investigation of the KS-8 blowout refers to the incident involving the KS-7 well as a "blowout" as well (*see* Independent Technical Investigation of the [PGV] Unplanned Steam Release, June 12 and 13, 1991 Puna Hawaii, AR-100256), and because the incident appears to meet the definition of a "blowout" provided by the Region (uncontrollable release of steam and brine), we will, for the purposes of this decision, refer to the incident as a "blowout." In any event, even were we to agree with PGV that the KS-7 incident involved a "steam kick" rather than a "blowout," our analysis would not be affected.

[10] Both blowouts also resulted in injuries to workers at the facility (AR-200113, 400063). The KS-8 blowout resulted in a 60-foot cloud of steam emanating from the well and required the evacuation of nearby residents. AR-400063.

injection wells (now authorized by the final permit) could endanger the USDW.[11]

We note further that in its Response to Comments, the Region stated that the State of Hawaii required financial assurance in the amount of $250,000 for plugging and abandoning the two existing production wells and three injection wells. Region's PGV Reply at 14. As the Region notes, however, PGV's own estimates indicate that the cost of plugging and abandoning only the three injection wells will exceed $140,000 per well. Letter from PGV to Region IX (Sept. 24, 1996) with attached "Cost Estimates to Plug and Abandon Injection Wells" (AR 101554-55). The Region, therefore, appropriately determined that the existing financial assurance mechanism was insufficient to properly close the injection wells and that additional requirements were necessary. *See* 40 C.F.R. § 144.25(a)(3) (the Agency may require a permit where protection of USDWs requires that the injection operation be regulated by requirements not contained in the rule); Response to Comments at ¶ 2.e. For these reasons, we conclude that the Region was justified in requiring a permit under the UIC regulations.

c. *Production Wells*

PGV asserts that the Region has exceeded its authority under the SDWA in attempting to regulate production rather than injection wells. *See* PGV Petition at 16-18. In commenting on this issue during the comment period PGV stated that "[p]roduction wells, not being injection wells, are outside EPA's jurisdiction." PGV Comments at 17. According to PGV, wells are typically drilled as production wells and then converted to injection wells if they prove unsuitable for production. *Id*. In responding to this comment, the Region stated:

> The final permit references production wells in regards to conversions from non-injection wells (e.g. developmental, production, exploration) to injection wells. The permit also requires notification prior to drilling injection and non-injection wells (e.g. developmental, production, exploration) because PGV and [the State] have notified EPA that all wells, including injection wells, will be drilled as production wells. So EPA can prepare for the likely conversion of a production well to an injection well, EPA is requiring notification prior to drilling any well. While production wells are not regulated under the UIC regula-

[11] PGV denies that these blowouts significantly affected the USDW. *See* PGV Petition at 24. According to PGV, the evidence regarding the alleged connection between USDW contamination and the blowouts at wells KS-7 and KS-8 is insufficient to conclude that these blowouts had any effect on the USDW. *Id.* at 25. While it may be true that the record is not conclusive on this issue, there is sufficient evidence from which the Region could conclude that PGV's operation *may* have resulted in contamination of the USDW. *See* SDWA § 300h(d) ("Underground injection endangers drinking water sources if such injection *may* result in the presence in underground water * * * of any contaminant * * *.") (Emphasis added).

> tions, EPA can address problems caused by production wells under section 1431 of the [SDWA] and other acts.

Response to comments at ¶ 17.a. Thus, although the Region concedes that the UIC regulations do not regulate production wells, the Region states that the final permit contains provisions relating to the drilling of such wells because it is PGV's practice to convert certain of these wells to injection wells. PGV's petition does not address the Region's response in this regard. Rather, the petition merely elaborates on PGV's assertion that the Region lacks authority to regulate production wells. Review is therefore denied on this issue. *See In re Arizona Municipal Storm Water NPDES Permits*, 7 E.A.D. 646, 661 (EAB 1998) (in order to obtain review, a petitioner must demonstrate why the Region's response to comments is clearly erroneous or otherwise warrants review), *review denied sub nom. Defenders of Wildlife v. U.S. EPA*, 191 F.3d 1159 (9th Cir. 1999).

Moreover, given the near certainty that at least some of the production wells will be converted to injection wells and thus be required to meet construction, monitoring, and other requirements under the UIC regulations, PGV has failed to convince us that inclusion of permit provisions related essentially to notifying the Region prior to drilling a new well (either injection or production) was unreasonable. *See* 40 C.F.R. §§ 144.52(a)(9) (authorizing the Region to "impose on a case-by-case basis such additional conditions as are necessary to prevent the migration of fluids into underground sources of drinking water.") and 144.52(b)(1) ("In addition to conditions required in all permits the Director shall establish conditions in permits as required on a case-by-case basis, to provide for and assure compliance with all applicable requirements of the SDWA and parts 144, 145, 146 and 124.").

For these reasons, we reject PGV's assertion that the Region lacked the authority to issue the permit with provisions addressing production wells.

2. *Area Permit*

PGV argues that even if the Region had the authority to issue a permit in this case, the Region erred in requiring an individual rather than an area permit. PGV states that it meets the requirements for an area permit under 40 C.F.R. § 144.33(a) and that an individual permit is not necessary.[12]

---

[12] 40 C.F.R. § 144.33(a) states:

> The Director may issue a permit on an area basis, rather than for each well individually, provided that the permit is for injection wells:
> (1) Described and identified by location in permit application(s) if they are existing wells * * *;
> (2) Within the same well field, facility site, reservoir, project, or similar unit in the same State;

Continued

That section states that the Region "*may*" issue a permit on an area basis under certain conditions. Upon review, we find no basis to grant review on this issue.

Nothing in the regulations requires the Region to issue an area permit even if the permittee might otherwise meet the requirements of section 144.33. Rather, the decision whether to issue an individual or area permit is left to the discretion of Region. In its response to comments on this issue, the Region stated, in part:

> [I]ssuing an area permit would eliminate public review and comment on the number of wells and their locations, because the exact number of wells and their location within the property boundary would not have to be given under an area permit. Given PGV's proximity to homes, the problems it has encountered drilling injection wells, and EPA's commitment to involve the public in this process, EPA decided not to issue an area permit which would allow PGV to drill an unlimited number of injection wells anywhere within the property boundary and eliminate public review of certain information.

Response to Comments at ¶ 5.a. Because we find nothing unreasonable in the Region's determination in this regard, review is denied on this issue.[13]

3. *Permit Provisions Unrelated to Protection of USDWs*

PGV argues that the Region has imposed permit conditions that are unrelated to the protection of USDWs and are therefore outside the scope of the SDWA. PGV objects to five permit conditions on this basis. These are: (1) condition II.A.2.a. (well setback requirement); (2) condition II.B.1.d (emergency response plan); (3) condition III.E.13 (notifications of non-permitted releases); (4) II.B.1.e. (recommended notification to emergency responders); and (5) II.E.11. (additional monitoring and reporting). According to PGV, because these conditions either arise under other statutory schemes or have no basis in the SDWA, the Region's decision to include such conditions was clearly erroneous and constitutes an abuse of discretion. PGV Petition at 31. Each of these permit conditions is discussed below.

(continued)

(3) Operated by a single owner or operator; and

(4) Used to inject other than hazardous waste.

[13] Moreover, PGV's petition fails to convince us that it suffered any substantial prejudice as a result of the Region's decision to issue an individual rather than an area permit. The petition does not, for example, mention any actions or activities that would be prohibited or made more burdensome as a result of the Region's decision. Indeed, at one point in the petition, PGV states that "[a]s an area permit holder, PGV also would be subject to the same regulatory requirements as if it were to receive an individual permit." PGV Petition at 27.

a. *Condition II.A.2.a: Setback Requirement.*

Condition II.A.2.a. of the final permit states:

> The permittee is authorized by the EPA to operate the three (3) existing geothermal injection wells, and construct and operate up to seven (7) new geothermal injection wells, contingent on the conditions of this permit being met. The new wells will be located on the well pads within the property boundary delineated in Appendix B, and will be set back at least 600 feet from the property boundary.

In responding to PGV's comment objecting to this condition during the comment period, the Region, citing 40 C.F.R. § 144.12(d), stated that it may on a case-by-case basis establish permit conditions "to prevent Class V wells from adversely affecting the health of persons." Response to Comments at ¶ 30.b. The Region further stated that "[t]here are homes adjacent to PGV's property line. Given that injection wells can blow out (KS-8 is an example of this), the setback is designed to prevent such incidences from adversely affecting the health of persons." *Id*. In its petition, PGV asserts that the provision should be removed because potential injury to nearby residents has nothing to do with USDW protection and is therefore outside the scope of the SDWA.[14]

In responding to the petition, the Region again states that the setback requirement is necessary to prevent adverse health effects to nearby residents because of prior blowouts at the facility. Region's PGV Response at 22. However, the Region fails to explain why the setback requirement would provide any additional protection to the USDW. *See In re Federated Oil & Gas*, 6 E.A.D. 722, 725 (EAB 1997) (a permit condition is appropriate only as necessary to implement the provisions of the SDWA and its implementing regulations) *(citing Envotech* 6 E.A.D. at 264). Accordingly, this provision is remanded. On remand, the Region must either provide an explanation of why this provision is necessary to protect the USDW or remove it from the permit.

---

[14] PGV also states that the setback requirement "is not related to the *operation* of the well, only the *drilling* of it * * * [and] [b]ecause the drilling of wells is not regulated under the UIC scheme * * * the permit condition is clearly erroneous." PGV Petition at 32. We disagree. As the Region points out, the regulations at 40 C.F.R. part 144 are replete with requirements related to the construction and drilling of wells. *See, e.g.*, 40 C.F.R. §§ 144.16 ("When injection does not occur into, through or above a [USDW] , the Director may authorize a well or project with less stringent requirements for area of review, *construction*, mechanical integrity * * *), 144.31(a) (Unless an underground injection well is authorized by rule under subpart C of this part, all injection activities, including construction of an injection well are prohibited), and 144.52(a)(1) (the owner or operator of a proposed new well shall submit plans for testing, drilling, and construction as part of the permit application). As we will not entertain challenges to the regulations in the context of a permit appeal, review is denied on this basis. *See* cases cites *supra* note 7.

b. *Condition II.B.1.d.: Emergency Response Plan*

Condition II.B.1.d. of the final permit states:

> Not withstanding [*sic*] the conditions of Part II.A.2. and II.B.6. of this permit being met, final approval of new wells will not be given until sixty (60) days following the close of the public comment period on EPA's review report of PGV's Emergency Response Plan. Approval of new wells shall be conditioned on the completeness of the emergency response plan.

PGV argues that review of this condition should be granted because: (1) the condition is overly vague because the Region has not established any criteria for determining the "completeness" of the emergency response plan ("ERP")[15] (PGV Petition at 32, 38-39); (2) the Region has no authority under the SDWA to require PGV to modify the emergency response plan (*Id.*); and (3) the provisions of the ERP bear little relationship to USDW protection but concern such things as air pollution and fire protection and are therefore beyond the Region's authority. *Id.* at 33.

In responding to PGV's comments on this issue during the public comment period, the Region stated:

> The ERPs are relevant to injection wells because an incident such as a blow out can impact the USDW by direct contamination or by fracturing the confining layer between the USDW and the blowout, and may adversely affect the health of persons. As stated in 40 C.F.R. § 144.52(b)(1), "In addition to conditions required in all permits the Director shall establish conditions in a permit as required on a case-by-case basis, to provide for and assure compliance with all applicable requirements of the SDWA and parts 144, 145, 146, and 124." This includes § 144.12(d) which states "Whenever the Director learns that a Class V well may be otherwise adversely affecting the health of persons, he or she may prescribe such actions as may be necessary to prevent the adverse effect, including any action authorized under paragraph (c) of this section." Accordingly, permit conditions shall be established to prevent Class V wells from adversely affecting the health of persons. The 60 days following the close of the

---

[15] PGV's ERP is a plan that consists of the following: a facility description, a description of local emergency services, a chain of command in case of emergency, a description of potential emergency situations, medical services available, evacuation plans, training requirements for employees, provision for emergency preparedness drills, procedures for coordination with local officials, and procedures to inform local residents. AR 401,116 (exhibit 4 to Region's PGV Response).

> public comment period gives EPA time to assess any new information in the public comments regarding potential adverse health affects from drilling a new injection well and the ability of the ERPs to mitigate these effects. The public comment period on EPA's review of the ERPs began on February 19, 1999 and closes on May 31, 1999. The 60-day UIC assessment of the public comments closes on July 30, 1999.
>
> Upon request, EPA, which is the agency responsible for enforcing the Emergency Planning and Community Right-to-Know Act, will review and comment on state or local ERPs. The National Contingency Plan (40 C.F.R. § 300.415(b)(2)) authorizes EPA to consider emergency response actions at those sites that pose an imminent threat to human health or the environment * * *. While EPA can review ERPs, EPA agrees that it cannot make PGV and the County modify their ERPs. * * * While EPA cannot make PGV correct deficiencies in its own ERP, PGV has the ability to remedy those deficiencies. Thus, the approval of new wells is contingent on the completeness of PGV's ERP. Criteria for completeness are contained in EPA's review of the ERPs.

Response to Comments at ¶ 32.e. In its response to the petition, the Region repeats its assertion that this condition is necessary to protect the USDW because of the possibility of blowout during drilling operations and to prevent adverse health effects to nearby residents. Region's PGV Response at 22-23.

Upon review, the Region has failed to convince us that this permit provision is necessary to protect USDWs. Although the Region asserts that it has authority to include this condition under 40 C.F.R. § 144.12(d) in order to prevent adverse health affects, it fails to adequately explain why this a permit condition is necessary to comply with the SDWA or UIC regulations. As the Board has previously explained:

> The [SDWA] and implementing criteria and standards are designed to assure that no contaminant in an underground source of drinking water causes a violation of a primary drinking water regulation or otherwise adversely affects the health of persons. * * * A permit condition or denial is appropriate only as necessary to implement these statutory and regulatory requirements * * *.

In re Terra Energy Ltd, 4 E.A.D. 159, 161 n.6 (EAB 1992). The "SDWA, as enacted by Congress, and the UIC regulations promulgated by EPA pursuant to Congress' mandate, establish the *only* criteria that EPA may use in * * * establishing conditions under which deep well injection is authorized." *In re Envotech, L.P.*, 6 E.A.D. 260, 264 (EAB 1996) (emphasis in original). The Region itself has conceded that the content of the ERP is essentially a state and local matter and

that EPA has no authority to require that PGV make any revisions to the ERP. Thus, it appears to us that the determination of whether or not the ERP is complete — which would appear to be an indirect means of compelling ERP revisions — is outside the scope of the Region's authority. *See Envotech* 6 E.A.D. at 272 (in issuing a UIC permit, the Region's authority is limited to implementing the UIC regulations promulgated in accordance with the mandate of Congress in the SDWA; issues of State or local jurisdiction are not a legitimate inquiry for EPA).

Further, although the regulations provide the permit issuer with broad discretion to impose a permit condition "necessary to prevent migration of fluids into [USDWs]" (40 C.F.R. § 144.52(a)(9)), this so called "omnibus authority" is not unlimited. *See Envotech, supra*. In supporting a permit provision under this provision, the Region must provide a sufficient explanation of why the permit condition is necessary for the protection of USDWs. Because the record before us does not contain a sufficient explanation in this regard, and because it appears to us that determining the completeness of the ERP is a matter outside the scope of the Region's UIC authority, this provision is remanded and the Region is ordered to either provide a sufficient explanation for this provision, remove it from the permit, or alter it to conform with its SDWA jurisdiction.[16]

c. *Condition III.E.13.: Notification of Non-permitted Releases*

Condition III.E.13. of the final permit states:

> a. Pursuant to the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) Section 103 and/or the Emergency Planning and Community Right to Know Act (EPCRA) Section 304, the permittee will immediately notify the National Response Center (NRC) at (800) 424-8802, the Hawaii State Emergency Response Commission (SERC) and the Hawaii County Local Emergency Planning Committee (LEPC) as soon as it has knowledge that there has been a release into the environment of a reportable quantity of a hazardous or extremely hazardous substance.
>
> b. As soon as practicable following a reportable release under EPCRA Section 304, the permittee will submit a written followup report to the SERC and LEPC which conforms to the requirements of that section.

[16] PGV also argues that this condition is clearly erroneous because it refers to another permit condition (Condition II.B.6) that does not exist. PGV Petition at 47. As discussed *infr*a, however, the Region has agreed to correct this error.

According to PGV, this provision merely reiterates existing requirements and serves to "augment the Region's enforcement ability or increase the ease of enforcing [and] is impermissible and beyond the scope of the Region's authority under the SDWA and UIC implementing regulations." PGV Petition at 33-34. PGV states that this provision "doubles Region IX's enforcement opportunities" by allowing the Region to respond to a late notification of a release required under CERCLA or EPCRA as a violation of those statutes as well as the UIC permit." *Id*. at 34. In support of this provision, the Region states as follows:

> PGV objects to these conditions which state existing requirements under the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA") and Emergency Planning and Community Right to Know Act ("EPCRA"). These conditions merely reiterate existing requirements under these two federal statutes and create no additional legal requirements for PGV.

Region's PGV Response at 23 (emphasis added).

The Region cites to no statutory or regulatory authority for including this condition nor does it explain any nexus between this condition and the prevention of migration of fluids into the USDW. Further, the Region states that the provision creates no additional legal requirements. As far as we can tell, the provision was included merely as a reminder to PGV of its obligations under CERCLA and EPCRA. Under these circumstances, we fail to see why the condition is necessary. Accordingly, the condition is remanded and the Region is ordered to either provide a sufficient explanation for this condition or remove it from the permit.

d. *Condition II.B.1.e.: Notification of Emergency Responders*

Condition II.B.1.e. of the final permit states: "It is recommended that the permittee notify the emergency responders (County Civil Defense, Fire Department and Police Department) prior to drilling any new injection or non-injection well." PGV argues that the Region is attempting to incorporate state and local requirements into the UIC permit that are not related to the protection of USDWs. In addition, PGV states that "including the condition as a 'recommendation' only blur PGV's obligations." PGV Petition at 34. The Region responds that this is "merely a recommendation and imposes no legal requirement on PGV." Region's PGV Response at 23.

Because the Region framed this provision as a condition and has not indicated why it is necessary for the protection of the USDW, it is remanded. The Region is ordered to either provide a sufficient explanation for including it as a condition, or remove it from the permit's list of conditions.

e. *Condition II.E.11.: Additional Monitoring and Reporting*

Condition II.E.11 states:

> If the operation of the injection wells is additionally regulated by other pollution control programs, e.g. Clean Air Act, the adherence to the monitoring and reporting conditions of such other pollution control programs shall not be circumvented by the terms and conditions of this permit.

PGV argues that this provision is vague and confusing, and is not authorized under the SDWA. PGV Petition at 35. According to PGV, the condition is vague because it is unclear if the Region would have PGV violate the UIC permit if a conflict arose with another pollution control program, and because the condition does not specify the "other pollution control programs" to which it is referring, except for the Clean Air Act. *Id*. at 35. PGV argues that the Region lacked the authority to include such a provision because the reporting and monitoring requirements of other pollution control programs is unrelated to protection of USDWs.

In its response, the Region does not specify the basis for this provision. The Region merely states: "This is a standard EPA permit condition which prevents compliance with the UIC permit from being used as a defense to violation of other statutes." Region's PGV Response at 23. In responding to comments on this issue during the comment period, the Region stated that the provision is authorized under 40 C.F.R. § 144.52(a) which states in part that "in addition to conditions required in § 144.51 [("Conditions applicable to all permits")], the Director shall establish conditions, as required on a case by case basis under * * * 144.54 (monitoring) * * *." Response to Comments at ¶ 63.a.[17] This response, however, merely states a possible basis for authority for the condition and does not explain the need for the condition or its relationship to the cited authority. Because the Region has failed to articulate any clear basis for including this condition, either

---

[17] We note further that in responding to the comment that this condition is vague in that it fails to specify what statutes and regulations are included in the term "other pollution control programs," the Region stated:

> Pollution control programs include, but are not limited to programs under the Safe Drinking Water Act (SDWA), the Clean Water Act (CWA), the Clean Air Act (CAA), the Resource Conservation and Recovery Act (RCRA), the Emergency Planning and Community Right to Know Act (EPCRA), and State and County laws and regulations. *For permit clarity, the final permit elaborates on what programs are covered by the term pollution prevention programs.*

Response to Comments at ¶ 63.a. (emphasis added). Except for a reference to the Clean Air Act, however, condition II.E.11. in the final permit fails to elaborate on what programs are covered. We can only assume that the Region inadvertently failed to include such an elaboration.

under 40 C.F.R. § 144.54 or some other regulatory provision, the condition is remanded and the Region is ordered to either provide a sufficient explanation for this provision or remove it from the permit.

4. *Vagueness*

PGV argues that certain conditions are so vague as to deny PGV fair notice of what is required under the permit and should therefore be deleted from the final permit.

a. *Definition of "well"*

Part I. of the permit states, in part, that PGV is authorized "to operate three existing Class V geothermal injection wells (the term 'well' shall refer to an injection well unless otherwise stated) * * *." Final Permit at p. 4. Appendix J to the final permit contains a list of definitions, including a definition of "well" which states: "'Well' means a bored, drilled or driven shaft, or a dug hole, whose depth is greater than its widest surface dimension." Appendix J (g). According to PGV, these two provisions define "well" in two different ways and, as a result, "PGV cannot determine which to apply to various parts of the facility." PGV Petition at 37. Thus, PGV asserts that the provision in Part I is impermissibly vague and should be removed. We disagree.

Contrary to PGV's assertion, the statement in Part I. of the permit does not define the term "well." Rather, this provision merely provides that the term well as used in the permit *refers* to an "injection well" in all instances unless specifically stated otherwise. The "well" portion of "injection well" is defined in Appendix J. Because PGV has failed to convince us that a conflict exists between these two provisions, and because PGV has also failed to provide any instances where confusion has or could occur, review is denied on this issue.[18]

b. *Condition II.B.1.a.: Notice of New Wells*

Condition II.B.1.a. states:

> The permittee shall give advance notice of at least fourteen (14) days to the EPA prior to spudding a new injection well or non-injection well (e.g. developmental, production, exploration well). The permittee shall give advance notice of at least fourteen (14) days to the EPA of the conversion of a non-injection well to an injection well.

---

[18] We note that the regulations at 40 C.F.R. § 144.3, define both the term "injection well" and "well."

PGV objects to this provision for two reasons. First, PGV states that it cannot determine whether there are other types of wells, besides the listed examples, that the Region would consider non-injection wells for purposes of the permit. PGV Petition at 38. Second, PGV states that this provision fails to the explain what type of information is required in the advanced notice. *Id*. PGV points out that Condition II.A.2.b. also requires advanced notice of new wells. That condition states:

> At least fourteen (14) days prior to spudding a new well, EPA shall receive from the permittee: 1) the latitude and longitude of the new well(s), and 2) a map similar to the one in Appendix B with the location of the existing and new wells.

PGV asserts that it cannot determine if these two permit conditions "are intended to be identical or if additional information is required in the II.B.1.a. advanced notice." PGV Petition at 38. For these reasons, PGV asserts that condition II.B.1.a. is impermissibly vague and its inclusion was clearly erroneous. *Id.*

With regard to PGV's first objection, the Region responds that it included examples of non-injection wells only for purposes of illustration and that the provision makes clear that *all* non-injection wells require advance notice. Region's PGV Response at 24. The Region then states that it will nevertheless modify Condition II.B.1.a. to state that "the permittee shall give advance notice *in writing*." *Id.* The Region does not address PGV's second objection, i.e., that the provision does not specify the type of information required in the "advanced notice."

Upon review, we agree with the Region that the provision states clearly that notice of all new injection or non-injection wells is required. Those listed in the parenthetical are merely examples of types of non-injection wells. Any other type of non-injection well would also be subject to the notification requirement. As to PGV's second objection, we see nothing confusing or ambiguous in the requirement that PGV provide advanced notice of its intention to drill a new well or to convert a well. By its terms, the provision merely requires PGV to inform the Region of its intentions. Because we find nothing unclear about this condition, review is denied.

c. *Condition II.B.1.b.: Well Conversion*

Condition II.B.1.b. states, in part:

> A new well or a non-injection well converted to an injection well may not commence injection until: i) construction is complete and the permittee has submitted a notice of completion of construction to the EPA through certified mail; and ii) the EPA has received and re-

> viewed the well information in II.B.1.c. and finds it is in compliance with the conditions of the permit.

PGV states that this provision is impermissibly vague because "PGV cannot determine whether a converted well (or well conversion) only refers to a well becoming (converted to) a Class V geothermal injection well and therefore cannot determine the breath of this requirement." PGV Petition at 38.

In response, the Region states:

> This condition covers converting geothermal *non-injection* wells to Class V geothermal *injection* wells. No other interpretation is possible, because the permit clearly authorizes only Class V geothermal wells * * *. No other types of Class V (or Class I, II, III, or IV) wells are authorized by this permit.

Region's PGV Response at 24. If any ambiguity existed in this provision, it has now been resolved by the Region's above-quoted interpretation. We consider the Region bound by this interpretation.

PGV also asserts that it is impossible to comply with this condition. PGV Petition at 40. In particular, the condition provides, among other things, that before injection may commence, PGV must provide the Region with certain well information in condition II.B.1.c., which includes "injectivity test results."[19] PGV argues that Condition II.B.1.b. is clearly erroneous because it is impossible to provide injectivity test results before injection begins.

In response the Region states that PGV is confusing injectivity testing conducted prior to commencing injection operations with actual injection operations. Region's PGV Response at 26. "When an operator drills a well, it must be tested to determine the suitability for injection. EPA does not understand why it is impossible to conduct an 'injectivity test' and provide EPA with the results prior to beginning injection operations." *Id*. Because the Region subsequently clarified when injectivity testing is to be conducted, and because we consider the Region bound by this clarification, we see no reason to grant review on this issue.

---

[19] Condition II.B.1.c. states:

> The permittee shall provide EPA with the following information for new and converted wells:
>
> * * * * * * *
>
> iii. The lithologic log and injectivity test results.

Finally, PGV argues that Condition II.B.1.b. is clearly erroneous because it makes reference to two other conditions of the permit (Conditions II.B.6.b.i. and II.B.6.c.) that do not exist. PGV Petition at 47. In response, the Region states:

> The permit does erroneously contained two conditions numbered II.B.5. Pursuant to 40 C.F.R. § 144.41(a) EPA will change the second Condition II.B.5. in the permit, entitled "Proposed Changes and Workovers" to Condition II.B.6. EPA will also change II.B.6.c. in the last sentence of Condition II.B.1.b. to Condition II.B.1.c. In II.B.1.b., EPA will change II.b.6.b.i. to II.B.1.a.

Region's PGV Response at 29. As these changes address PGV's concerns on this issue, this condition is remanded so that the Region can make appropriate modifications.

d. *Condition II.B.4: Injection Intervals*

Condition II.B.4. states, in part:

> For each well, injection into the intended zones will be through the open borehole, with or without a slotted (perforated) liner, below the cemented solid casing. Alteration of the injection perforations and other rework operation must be properly reported using EPA Form 7520-12 in Appendix C — Approved Changes and Workover Plans and Sample Forms.

PGV asserts that the provision is impermissibly vague because it is unclear whether this is merely a reporting obligation or requires prior approval from EPA. PGV Petition at 39.

In its response, the Region makes clear that this provision creates only a reporting obligation, and we hold the Region to this interpretation. Review is therefore denied.

e. *Condition II.C.1.b.: Area of Review*

Condition II.C.1.b. states:

> Unless corrective action has been taken, the construction of a new injection well or conversion to an injection well is prohibited within the area of review [("AOR")] until all abandoned, improperly sealed, or improperly completed wells that are located within the AOR and penetrate the injection zone are properly plugged and abandoned by the appropriate party.

PGV contends that this provision is impermissibly vague because it uses the term "injection zone" without indicating to what injection zone it is referring. PGV suggests that the term could refer to a new injection well in which case "the injection zone would not exist, because the well itself does not exist." PGV petition at 39. We disagree.

That part of the sentence containing the term "injection zone" clearly refers back to "all abandoned, improperly sealed, or improperly completed wells that are located in the AOR." We find nothing ambiguous in this provision. Review is therefore denied.

f. *Condition II.C.2.a.: Corrective Action*

Condition II.C.2.a. states:

> The drilling of a new well or conversion to an injection well is prohibited within a one-four[th] (1/4) mile of SOH-1 until internal and external mechanical integrity has been demonstrated to the EPA by some party.

PGV states that this provision is impermissibly vague because "PGV cannot determine whether the requirement for 'internal and external mechanical integrity' applies to the new well or to SOH-1."[20] PGV Petition at 40.

In its response, the Region interprets the requirement for internal and external mechanical integrity in this provision as being applicable to SOH-1. We consider the Region bound by this interpretation. Review is therefore denied on this issue.

5. *Certain Provisions Make Compliance Impossible*

a. *Condition II.E.2.c.: Pressure Recordings*

Condition II.E.2.c. states, in part:

> In addition, a continuous recording of the injection wellhead pressure, injection rate, and annulus pressure shall be maintained. Injection wellhead pressure, injection rate and annulus pressure shall be visually checked daily. Pressure recordings shall be documented on a graphical chart, such as a strip chart or a circular chart, that shows the relationship between pressure and elapsed time. The pressure recordings shall be maintained whether or not the injection well is in use.

---

[20] SOH-1 is another well not owned by PGV. PGV Petition at 40.

> *The pressure recordings shall distinguish between the time periods of use and nonuse, if any.*

(Emphasis added). PGV argues that the requirement of this condition regarding pressure recordings is clearly erroneous because "[t]here is no known equipment that can distinguish between periods of use and non use." PGV Petition at 40. In response the Region states:

> No special equipment is needed to comply with this condition. EPA is requiring PGV to continue the practice which PGV employed during the shut-in of [well] KS-3 after it lost mechanical integrity. PGV simply manually recorded the periods of non use on the strip chart from the pressure recorder.

Region's PGV Response at 26 (citation omitted).

As the Region has now clarified how PGV is expected to comply with this provision, we see no reason to grant review.

b. *Condition II.D.2.b. and II.E.12.c.: Leaks*

Condition II.D.2.b. requires that "[a]ll piping, valves and facilities associated with injection operations * * * be maintained in a safe and leak-free condition." Condition II.E.12.c. requires reporting of any noncompliance which may endanger health or the environment, including any wellhead leaks. PGV asserts that it should only be required to control and report "significant leaks" and that the Region has failed to explain "why it was appropriate to control 'all leaks' in this section but not others." PGV Petition at 41.

In its response to PGV's assertion on this issue the Region states:

> EPA retained the requirement that "any" leaks be reported in Condition II.D.2.b. because this condition applies only to portions of the facility that are above ground, and thus more easily detectable. This is in contrast to the portion of the facility which are below ground where leaks are less easily detected, e.g. Condition I.D.1.b. where a 10% increase or decrease in a wells annulus pressure constitutes a significant leak, and is reportable.

Region's PGV Response at 27. Although the Region does not mention Condition II.E.12.c., we assume that the same rationale would apply since the wellhead is above ground.

Because we find nothing unreasonable in the Region's explanation, and because PGV has failed to indicate in its reply why this explanation is erroneous, review is denied on this issue.

c. *Condition II.E.12.: Twenty-Four Hour Reporting*

Condition II.E.12. states, in part:

> 12. Twenty-Four Hour Reporting
>
> The permittee shall report any noncompliance which may endanger health or the environment, including:
>
> * * * * * * *
>
> c. Any wellhead leaks or overflow from the ESRF [(Emergency Steam Release Facility)] pond.

PGV asserts that this condition is clearly erroneous because the ESRF pond is part of the production rather than the injection system.[21] PGV Petition at 41-42.

In responding to PGV's comment on this issue during the comment period, the Region stated: "the ESRF collects and contains fluids prior to sending them directly to the injection wells. Any overflow or leak in the ESRF would allow fluids intended for injection to be disposed of directly on the ground which could be a violation of section 1431 of the SDWA." Response to Comments at ¶ 64.d. Because PGV's petition fails to indicate why the Region's response on this issue was clearly erroneous, review is denied on this issue. *See In re Beckman Production Services*, 8 E.A.D. 00,00n.4 (EAB 1999) (petitioners may not simply reiterate previous permit objections, but must demonstrate why the Region's response to these objections is clearly erroneous or otherwise warrants review).

[21] PGV also argues in its petition that the condition imposes requirements unnecessary to protect USDWs, and the condition is void as vague because PGV cannot determine what the conditions require. As these issues were not raised during the comment period, however, they were not preserved for review. 40 C.F.R. § 124.19(a).

6. *Certain Conditions Violate SDWA § 300j-4 (Records and inspections) and 40 C.F.R. § 144.5 (Confidentiality of information)*

a. *Condition III.E.9.: Availability of Reports*[22]

Condition III.E.9 states:

> All reports prepared in accordance with the conditions of this permit shall be available for public inspection at appropriate offices of the EPA. Permit applications, permits, and well operation data shall not be considered confidential.

PGV contends that this provision is contrary to the SDWA and its implementing regulation in that it fails to recognize the right to claim certain information as confidential and contradicts Condition III.D. of the final permit,[23] which, according to PGV, "accurately recognizes that the SDWA and the UIC Program regulations allow a permit applicant to protect confidential business information and, indeed require the Administrator not to divulge such information." PGV Petition at 43-44.

In its response, the Region has agreed to modify this provision. In particular, the Region states: "Because of the potential for confusion, EPA will modify the end of the last sentence of Condition III.E.9. * * * to state "except as limited by Condition III.D." Region's PGV Response at 28. As this appears to address PGV's concerns, the permit is remanded on this issue so that the Region can modify the permit accordingly.[24]

b. *Condition II.F.2.: Plugging and Abandonment Plan*

Condition II.F.2. states, in part:

---

[22] In its petition, PGV mistakenly refers to this condition as II.E.9. PGV Petition at 42.

[23] Condition III.D. (Confidentiality) states:

> In accordance with 40 C.F.R. §§ 2 and 144.5, any information submitted to the EPA pursuant to this permit may be claimed as confidential by the submitter. Any such claim must be asserted at the time of the submission by stamping the words "confidential business information" on each page containing such information. If no claim is made at the time of submission, the EPA may make the information available to the public without further notice.

[24] In its reply to the Region's response, PGV states: "The Region admits that this condition is improper and potentially confusing. It should therefore be stricken rather than modified in the manner suggested by the Region." PGV Reply at 22. However, because the modification appears to address PGV's concerns, we see no reason to grant review.

> The permittee shall abandon the well according to the Plugging and Abandonment Plan in Appendix I. and must also comply with the abandonment conditions required by the State of Hawaii and the County of Hawaii.

PGV argues that the requirement that it comply with State and local abandonment plans is clearly erroneous because these plans are not part of the permit, and the Region has not reviewed the requirements of these plans and determined that they are necessary to protect the USDW. PGV Petition at 45. According to PGV, the Region has improperly delegated permitting authority to local agencies to impose unspecified requirements. *Id*.

In its response to PGV's petition, the Region states that it included this provision "to prevent PGV from using compliance with EPA's Plugging and Abandonment requirements as a defense to noncompliance with the state and county requirements." Region's PGV Response at 28. Upon review, we would find nothing erroneous with the inclusion of a condition that carried out the Region's stated intention for this condition. The Region interprets this provision as not incorporating state and county requirements into the federal UIC permit, but rather simply as preventing PGV from relying on the EPA requirements in defending an alleged violation of state and local requirements. This interpretation is consistent with 40 C.F.R. § 144.35(c), which states that "[t]he issuance of a permit does not authorize * * * any infringement of State or local law or regulations." However, because the permit provision states that PGV "must comply" with State and local requirements, the condition by its terms goes beyond the Region's interpretation and, therefore, must be remanded so that the Region can make appropriate revisions.

c. *Condition III.E.10.: Signatory Requirements*[25]

Condition III.E.10 states:

> All reports or other information requested by the [Hawaii Department of Health ("DOH")] and/or EPA shall be signed and certified by a responsible corporate officer or duly authorized representative according to 40 C.F.R. § 144.32.[26]

---

[25] PGV incorrectly identifies this provision as II.E.10. in its petition.

[26] 40 C.F.R. § 144.32 requires, among other things, that reports required by permits, as well as other information requested by the Region, be signed by a responsible corporate officer or duly authorized representative. *See* 40 C.F.R. § 144.32(b).

PGV argues that requirements of 40 C.F.R. § 144.32 are limited to information requested by EPA and "[i]nclusion of DOH is therefore clearly erroneous, as it is in excess of Region IX's authority." PGV Petition at 46.

In response the Region states that it "intended to require that information submitted to EPA, or EPA and DOH together be certified according to 40 C.F.R. § 144.32(b). EPA will modify Condition III.E.10 from 'DOH and/or EPA' to 'EPA, or DOH and EPA.'" As this change

would address petitioner's concerns, this condition is remanded so that the Region can make the above-quoted modification.

7. *Typographical or Other Errors*

a. *Part I*

Part I of the permit authorizes, among other things, injection of "geothermal noncondensible gases that are produced during the operation of the well field and power plant." PGV argues that this provision is clearly erroneous because geothermal noncondensible gases are not produced during the operation of the well field but already exist in the geothermal fluids which come from the well. PGV petition at 47. In response, the Region acknowledges that geothermal noncondensible gases originate underground, but states that the condition is not erroneous because the term "produced" "is a term of art in the UIC regulations (and in the industry) to describe liquids or gases that originated underground but are then brought to the surface." Region's PGV Response at 29. The Region then cites to various regulatory provisions using the word "produced" and variations thereof to refer to resources originating underground.

Because the Region has made clear that the term "produced" as used in the above-quoted portion of Part I of the permit refers to geothermal noncondensible gases that already exist in the geothermal fluids which come from the well, we see no reason to grant review on this issue.

b. *Condition II.B.5.d.ii.: Flow Meter*

Condition II.B.5.d.ii. requires that PGV maintain a "flow transmitter on each well that provides information directly to the control room of the plant." PGV asserts that the inclusion of this provision is erroneous because in its response to comments (at ¶ 37.g.), the Region stated that it would not require a flow transmitter on each well but would only require a flow transmitter on the "combined flow injection line." PGV Petition at 47. In response, the Region agrees that it erroneously added Condition II.B.5.d.ii to the permit and has agreed to delete this provision. Region's PGV Response at 30. Accordingly, on remand, the Region is ordered to delete Condition II.B.5.d.ii. from the permit.

c. *Condition II.B.5.f.*

Condition II.B.5.f. requires that PGV maintain: "A device on the line between the Emergency Steam Release Facility (ESRF) and the combined flow injection line for measuring the quantity of supplemental water going to the wells." PGV argues that no such line exists and that the Region should revise this provision to refer to "the line between the Emergency Steam Release Facility (ESRF) *pond* and the combined flow injection line for measuring the quantity of supplemental water going to the wells." PGV Petition at 48. In its response, the Region has agreed to make this revision. Accordingly, on remand, the Region is ordered to revise this condition accordingly.

d. *Conditions II.D.1.b. and II.E.2.c.*

Condition II.D.1.b. states, in part: "an annulus pressure increase or decrease of more than ten (10) percent in five (5) hours constitutes a significant leak, unless it occurred during the normal shut-in of a well for repairs * * *." PGV argues that use of the word "increase" makes no sense in the context of a leak, and that "[w]ithout revision, this condition and condition II.E.2.c. which require 24 hour reporting of such 'leaks' is clearly erroneous." PGV Petition at 48. PGV notes that the term "increase" did not appear in the draft permit. In its response, the Region states: "[w]hen a leak occurs in part of the casing where the pressure in the formation is greater than the pressure in the well, a leak will result in a significant increase in pressure in the well." Region's PGV Response at 30.

Because we find nothing unreasonable in the Region's explanation, we see no reason to grant review on this issue.

B. *Friends of the Red Road Petition: UIC Appeal No. 99-2A*

On July 29, 1999, Friends of the Red Road ("FRR") filed a petition for review with the Board.[27] At the Board's request, the Region filed a response to the petition. *See* Responses to Petitions for Review (April 14, 2000) ("Region's FRR Response").[28] PGV has filed a motion to dismiss the petition as untimely and for failing to meet the standards for review under 40 C.F.R. § 124.19. *See* Motion to Dismiss Petitions for Review Filed by Gail Mackenzie and Friends of the Red Road (Athena Peanut) ("PGV Motion") (April 12, 2000). FRR raises the following issues: 1) PGV's Emergency Response Plan ("ERP") is inadequate to protect local

[27] The petition is signed by Athena Peanut, and states that Ms. Peanut is appealing in her capacity as President of FRR and as an individual. For simplicity, the petition will be referred to as "FRR Petition."

[28] The Region's April 14, 2000 submission also responded to a petition filed by Ms. Gail MacKenzie. This appeal will be discussed further *infra*.

residents; 2) air emissions from the PGV facility are affecting residents' catchment drinking water systems; 3) "[t]here is no closed system"; and 4) the permit fails to protect human health and the environment and improperly designates certain comments as beyond the scope of the UIC permit. FRR Petition at 1-4. In response, both the Region and PGV assert that review should be denied because FRR has failed to meet the standard of review under 40 C.F.R. § 124.19. In addition, PGV asserts that the petition should be dismissed as untimely. For the following reasons, review is denied.

1. *Timeliness*

Under the regulations governing permit appeals, a petition for review of a permit decision must ordinarily be filed with the Board within 30 days of service of notice of the final permit decision by the Region. 40 C.F.R. § 124.19(a). Where, as here, the final permit decision is served by mail, a petitioner has an additional three days in which to file a petition for review. 40 C.F.R. § 124.20(d). Documents are considered filed on the date they are *received* by the Board,[29] and failure to ensure that a petition for review is received by the filing deadline will generally lead to dismissal of the petition on timeliness grounds. *See In re Envotech, L.P.*, 6 E.A.D. 260, 266 (EAB 1996) (dismissing as untimely permit appeals received after the filing deadline).

In this case, the Region issued and served the final permit on June 16, 1999. Thus, ordinarily, the deadline for filing a petition with the Board would have been July 19, 1999, 30 days plus three days. However, in its June 16th public notice regarding issuance of the final permit, the Region stated that the appeal period would close on July 21, 1999. Moreover, the Region states that its staff erroneously informed various commenters that a petition would be timely if it were *postmarked* by July 21st. Region's FRR Response at 4. Because it appears that FRR's petition was postmarked by July 21st, we will consider the appeal timely filed.[30]

2. *Emergency Response Plan*

FRR argues that PGV's ERP is inadequate in that it fails to insure the protection of local residents. Given the Board's remand of the permit provision concerning the ERP, there is no reason to grant review on this issue.

---

[29] *See In re Outboard Marine Corp.*, 6 E.A.D. 194, 196 (EAB 1995).

[30] For the same reasons, the Region states that it does not contest the timeliness of FRR's petition.

3. *Air Emissions*

FRR asserts that air emissions from the PGV facility are contaminating residents' catchment drinking water systems and should therefore be regulated in the UIC permit. As stated above, however, the SDWA and the UIC regulations provide the only criteria the EPA may use in establishing permit conditions. *See Envotech*, 6 E.A.D. at 264. Because neither the SDWA nor the UIC regulations authorize the Agency to regulate air emissions from a UIC facility, FRR's concerns are outside the scope of the UIC program. Moreover, as the Region explains in its response, because catchment systems serving individual residences are not USDWs, they cannot be regulated in a UIC permit. Region's FRR Response at 5; *In re NE HUB Partners*, 7 E.A.D. 561, 567 (EAB 1998) (the purpose of the SDWA and its implementing regulations is to prevent the movement of contaminants into USDWs), *review denied sub nom. Penn Fuel Gas, Inc. v. U.S. EPA*, 185 F.3d 862 (3d Cir. 1999); *In re Terra Energy, Ltd.*, 4 E.A.D. 159, 161 n.4 (EAB 1992) (same). Review is therefore denied.

4. "*Closed Loop System*"

In commenting on the draft permit, PGV stated, among other things, that a test parameter for isopentane was unnecessary because PGV uses N-pentane rather than isopentane. In response, the Region acknowledged that PGV uses N-pentane and stated: "EPA is monitoring for N-pentane to ascertain that PGV's system is a closed loop." Response to Comments at ¶ 83.a. In its petition, FRR states:

> There is no closed loop system. Hawaii Electric Power & Light, Co. (Helco), using the term "fugitive gases" for PGV's missing-in-action pentane, reported 12,000 gallons mysteriously missing each quarter regularly to members of the Helco Citizens Advisory Board in 1998. Helco correctly or incorrectly used the name isopentane at that time. I sit on that board.

FRR petition at 3.

Because the Board cannot ascertain from the above-quoted statement the permit condition to which FRR is objecting, the statement lacks the specificity necessary to support a petition for review. As the Board has consistently held, "a petition for review must contain fundamental information in order to justify consideration on the merits." *In re Federated Oil & Gas*, 6 E.A.D. 722, 726 (EAB 1997). In particular, 40 C.F.R. § 124.19 requires a petition for review to include, at a minimum, "two essential components: (1) clear identification of the conditions in the permit [that are] at issue, and (2) argument that the conditions warrant review." *In re Beckman Production Services*, 5 E.A.D. 10, 18 (EAB 1994). Be-

cause FRR fails to meet this requirement, review is denied on this issue.[31]

5. *Human Health and the Environment*

In its response to comments, the Region stated that certain comments were outside the scope of the UIC permitting program. According to FRR, by failing to consider certain issues, the Region failed to give adequate consideration to the protection of human health and the environment. FRR cites to the following issue that the Region refused to consider: "ATSDR health study and Dr. Marvin Legator, Dr. Sam Ruben, genocide, asthma, elevate fetal deaths, learning disabilities, and lead testing." FRR Petition at 3.

However, as FRR's concern does not challenge the validity of any particular provision of the PGV permit, it fails to satisfy a basic prerequisite for obtaining board review under 40 C.F.R. § 124.19, namely, the identification of a specific permit term that is claimed to be erroneous. *See Federal Oil & Gas*, 6 E.A.D. at 730. Moreover, as the Region states in its response, the permit includes conditions that the Region determined were necessary to protect USDWs from potential contamination resulting from the PGV facility. In particular, the Region states:

> Issuance of an individual UIC permit allowed EPA to add conditions related to well construction (section II.B.); corrective action (section II.C.); and well operation, (section II.D.); which included mechanical integrity (section II.D.1.); injection pressure limitations (section II.D.2.a. and II.D.2.b.); and injection rate limitation (section II.D.3). The permit also included additional monitoring, record keeping, and reporting requirements, specifically a hydrological monitoring program (section II.E.1.); a program for mechanical integrity testing and monitoring of injection wells (section II.E.2.); injection fluid monitoring program (section II.E.3.); twenty-four hour reporting (section II.E.12); and reporting of noncompliance with permit limitations (section II.E.13). The permit requires PGV to plug and abandon wells that are no longer used (section II.F.); maintain financial responsibility (section II.G.); maintain proper operation and maintenance (section II.E.5); provide information (section III.E.6); allow inspection and entry (section III.E.7); report changes and noncompliance (section

[31] We recognize that FRR is not represented by counsel and, as in previous cases, we have therefore endeavored to construe FRR's objections generously so as to identify the substance of its arguments. However, "[w]hile the Board does not expect or demand that [*pro se*] petitions will necessarily conform to exacting and technical pleading requirements, a petitioner must nevertheless comply with the minimal pleading standards and articulate *some* supportable reason why the Region erred in its permit decision in order for petitioners concerns to be meaningfully addressed by the Board." *In re Environmental Disposal Systems, Inc.*, 8 E.A.B. 23, 28 n.5 (EAB 1998). *See also In re Sutter Power Plant*, 8 E.A.D. 680, 687-88 (EAB 1999).

> III.E.11) and provide immediate and follow-up notification of non-permitted releases (section III.E.13).

Region's FRR Response at 9-10 (citations omitted). Nothing in FRR's petition indicates why these conditions are not sufficient to ensure protection of USDWs and, therefore, to protect human health and the environment as contemplated by the SDWA. Review is therefore denied.

C. *Gail Mackenzie Petition: UIC Appeal No. 99-2B*

As previously stated, based on the Region's erroneous statement regarding the deadline for filing petitions for review in this case, a petition must have been postmarked no later than July 21, 1999, to be considered timely. Because Ms. Mackenzie's petition was not postmarked until July 23, 1999, it was untimely and is therefore dismissed. *See In re Williams Pipe Line Company and L & C Services, Inc.*, CAA Appeal No. 97-3 (EAB, Feb. 27, 1997) (Order Dismissing Appeal) (dismissing with prejudice as untimely an appeal filed by U.S. EPA Region VII because the appeal was not received by the Board by the filing deadline); *In re Outboard Marine Corp.*, 6 E.A.D. 194 (EAB 1995) (dismissing as untimely an appeal filed by U.S. EPA Region V because the appeal was received by the Board one day after the filing deadline).

D. *Adrian Barber Petition: UIC Appeal No. 99-3*

On April 25, 1999, Mr. Barber filed a motion seeking additional time to file a petition for review in this matter.[32] Mr. Barber stated that he is the former president and board member of Puna Malama Pono, a community-based, non-profit corporation. In support of his request for an extension of time, Mr. Barber stated that during his association with Puna Malama Pono, he was the designated "point of contact" with Region IX headquarters in his community. Further, Mr. Barber represented that because of "fatigue" and a "breakdown," he resigned his functions with Puna Malama Pono in early 1999. Although Mr. Barber said he had a "clear recollection" of informing the Region of his resignation, he stated that "somehow, this information did not make its way appropriately through [Region IX]," with the result that material related to this proceeding was sent to Puna Malama Pono rather than to his own address. Because of this alleged communication lapse, Mr. Barber asserted that "until recently," he failed to receive public notification of the permit and draft permit issued in this proceeding, along with associated public comments and responses. Citing the "considerable amount of material" he was required to review, Mr. Barber sought additional time of "approximately one

---

[32] PGV filed a motion requesting that the Board deny Mr. Barber's request. Motion to Deny Adrian Barber's Late Filed Petition for Review (Aug. 5, 1999).

week" from the date of his motion in order to file a petition for review with the Board.

By order dated July 27, 1999, we stated that Mr. Barber had not convinced us that an extension of time to file a petition for review was appropriate. Nevertheless, we stated that "if Mr. Barber can established to the Board's satisfaction that Region IX improperly denied him notice of this proceeding, we shall grant Mr. Barber an extension of time to August 4, 1999, to file a petition for review." Order at 2. The Board further stated that Mr. Barber could include his justification for the extension in his petition and that the petition must be received no later than August 4, 1999.

Mr. Barber filed his petition with the Board on August 20, 1999. The petition is dated August 13, 1999, and was sent by Express Mail on August 18, 1999. Because the petition was not received by the August 4, 1999 extended deadline, the petition is hereby dismissed as untimely.

E. *Michael T. Hyson Petition: UIC Appeal No. 99-4*

Mr. Hyson's petition ("Hyson Petition"), a one page letter dated July 21, 1999, states:

> I hereby petition the Board to stop this permit and shut down geothermal operations in Hawaii based on primarily reasons of health and because of the current and continuing risk of the contamination of the ground water which we drink, and on the utter devastation the [*sic*] might be visited on this community at any time should a major blowout occur. I call on the EPA to help end this atrocity that is genocidally gassing a civilian population in the name of "renewable energy."

Hyson Petition. Mr. Hyson provides no documentation supporting his assertions, nor does he cite to any part of the administrative record regarding the alleged dangers of the PGV facility. Moreover, Mr. Hyson fails to challenge the validity of any particular provision of the PGV permit and therefore fails to satisfy a basic prerequisite for obtaining Board review under 40 C.F.R. § 124.19. *See In re Environmental Disposal Systems, Inc.*, 8 E.A.D. 23, 35 (EAB 1998). Review is therefore denied on the above-quoted issue.

Mr. Hyson's petition also states: "The further reason supporting this demand for review are the same as those being submitted by Adrian Barber and Rene Siracusa." However, because the Board has decided that Mr. Barber's petition must be dismissed as untimely, we decline to consider the issues raised in that appeal. Mr. Siracusa's petition is discussed below.

F. *Puna Outdoor Circle Petition: UIC Appeal No. 99-5*

By petition dated (and postmarked) July 20, 1999, Puna Outdoor Circle ("POC"), through its president, Rene Siracusa, seeks Board review of the Region's permit determination on four grounds. These are as follows.

(1) As discussed above, the permit conditions the construction of new wells on the "completeness" of PGV's Emergency Response Plan. *See* Permit Condition II.B.1.d. According to POC, neither PGV's nor Hawaii County's ERP is "complete." However, because we have remanded permit condition II.B.1.d. and ordered the Region to remove it from the permit (*see* section II.A.3.b above), this issue is now moot. Review is therefore denied.

(2) POC asserts that PGV should not be issued a permit because of its poor compliance history. However, as the Board has previously stated, concerns regarding a permittee's past violations "do not, without more, establish a link to a 'condition' of [a UIC permit], and thus do not provide a jurisdictional basis for the Board to grant review. *See* 40 C.F.R. § 124.19 (only 'condition[s] of a permit decision' are reviewable on appeal to the Board)[.]" *In re Envotech, L.P.*, 6 E.A.D. 260, 273 (EAB 1996) (quoting *In re Laidlaw Environmental Services*, 4 E.A.D. 870, 882-83 (EAB 1993)). A permit will not be denied due to a permittee's past practices absent a showing that "no matter what conditions or terms are put into the permit, compliance with the permit cannot ensure protection of USDWs." *Envotech*, 6 E.A.D. at 274. Because POC has failed to make such a showing, review is denied on this issue.

(3) POC argues that the Region has failed to consider the effect of air emissions from the PGV facility on the catchment systems of local residents. As stated above, however, neither the SDWA nor the UIC regulations authorize the Agency to regulate air emissions from a UIC facility. FRR's concerns are therefore outside the scope of the UIC program. Review is therefore denied.

(4) Finally, POC argues that the Board should review the siting of the PGV facility because "[t]he PGV facility is located in a 'geothermal resource subzone' and an agricultural zone that includes residents. This is a zoning conflict that needs to be addressed by the appropriate State and County land use and planning entities." POC Petition at ¶ 4. However, because the "zoning conflict" to which POC refers is a matter to be resolved at the State or local level, POC's request for Board review is denied. *See Envotech*, 6 E.A.D. at 272 (siting of wells are "matter[s] of State or local jurisdiction rather than a legitimate inquiry for EPA (except to the extent that a petitioner can show that a well cannot be sited at its proposed location without necessarily resulting in violations of the SDWA or UIC regulations).").

III. *CONCLUSION*

For the reasons stated above, the permit is remanded. On remand, the Region is ordered to: 1) remove condition II.B.5.d.ii (flow meter) from the permit; 2) provide a sufficient rationale for inclusion of the following conditions or remove them from the permit: II.A.2.a (600-foot setback requirement), II.B.1.d. (emergency response plan), II.B.1.e. (notification of emergency responders), II.E.11. (additional monitoring and reporting), II.F.2. (plugging and abandonment plan), and III.E.13. (notification of non-permitted releases). Unless the Region decides to remove these conditions (or the offending portions of these conditions) from the permit, the Region must accept and respond to public comments on its decision to retain these conditions. Any party who participates in the remand process with regard to these permit conditions and is not satisfied with the Region's decision on remand, may file an appeal (limited to these issues) with the Board pursuant to 40 C.F.R. § 124.19; 3) modify condition II.B.1.a. to state that "the permittee shall give advance notice *in writing*"*;* 4) change the second condition "II.B.5." in the permit, entitled "Proposed Changes and Workovers" to condition "II.B.6.," change the reference to condition "II.B.6.c." in the last sentence of condition II.B.1.b. to "II.B.1.c.," and, in condition II.B.1.b., change the reference to "II.B.6.b.i." to "II.B.1.a."; 5) modify the last sentence of condition III.E.9. to state "except as limited by Condition III.D."; 6) substitute "EPA, or DOH and EPA" for "DOH and/or EPA" in condition III.E.10.; and 7) modify condition II.B.5.f. by adding the word "pond" after "the Emergency Steam Release Facility (ESFR)."[33]

The petitions filed by Gail Mackenzie (appeal no. 99-2B) and Adrian Barber (appeal no. 99-3) are dismissed as untimely. On all other issues raised by the various petitioners, review is denied for the reasons stated above.

So ordered.

---

[33] Although 40 C.F.R. § 124.19 contemplates that additional briefing typically will be submitted upon a grant of review, a direct remand without additional submissions is appropriate where, as here, it does not appear as though further briefs on appeal would shed light on the issues to be addressed on remand. *In re Jett Back, Inc.,* 8 E.A.D. 353, 380 n.27 (EAB 1999).