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

In re:	)	
	)	Appeal No. UIC 13-03
Chevron Michigan, LLC of Traverse City, Michigan	)	
	)	
Underground Injection Control (UIC) Permit No. MI-009-2D-0217	)	
	)	

MOTION TO DENY REVIEW OF PETITION
OR, IN THE ALTERNATIVE, MOTION FOR EXTENSION OF TIME

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The Respondent, U.S. Environmental Protection Agency, Region 5 ("EPA" "Region 5" or "the Region"), by and through its Office of Regional Counsel, hereby moves the Environmental Appeals Board ("Board" or "EAB") to deny review on procedural grounds of the Petition Seeking Board Review of Underground Injection Control Permit #MI-009-2D-0217, filed August 19, 2013) [hereinafter Petition #2], by Norma Petrie ("Petitioner") in Appeal Number UIC 13-03. However, if the Board does not deny review of this motion on procedural grounds, the Region respectfully requests a 60 day extension of time for the Region to file a substantive Response to the Petition.

This motion is submitted pursuant to 40 C.F.R. § 124.19(f) and the Environmental Appeals Board Practice Manual dated August 2013 ("EAB Manual"). Pursuant to 40 C.F.R. § 124.19(f)(2), the Region contacted Petitioner via email and letter on September 10, 2013, in advance of filing this motion in order to ascertain whether the Petitioner concurs or objects to this motion. Petitioner has not supplied any response.

The Board previously issued a Remand Order on this matter in *In re Chevron Michigan, LLC of Traverse City, Michigan*, UIC Appeal No. 12-01 (EAB Mar. 5, 2013). In the Remand Order the Board denied all of Petitioner's substantive claims from her prior petition [hereinafter Petition #1], finding that her "generalized, conclusory assertions" lacked the necessary specificity to warrant review. *In re Chevron Michigan*, slip op at 16. The Board remanded the permit decision only on very limited procedural issues, finding that, because of certain date and signature ambiguities in the record, it was unclear whether the permit decision maker in fact considered all public comments and response to comments in making her final decision as

required by 40 C.F.R. §§ 124.17 and 124.18. *Id.* at 2 and 16. The Region has reissued this final permit decision, correcting these procedural issues pursuant to and consistent with the Board's instructions in the Remand Order.

In the Remand Order, the Board specifically limited the issues that could be raised in a subsequent petition, stating that "No new issues may be raised that could have been raised, but were not raised, in the present appeal." *Id.* at 18. However, in Petition #2 now before the Board, Petitioner attempts to raise new issues that could have been raised in her prior petition, but were not. Accordingly, we request that the Board deny review of Petition #2. In the event that the Board denies this motion, the Region moves that the Board grant a 60 day extension of time to file a Response Brief. The Region seeks this additional time due, in part, to the fact that the Petitioner did not serve notice on the Regional Administrator or provide a certificate of service as required by 40 C.F.R. §§ 124.19(i)(3) and (4), and the Region did not find out about the petition until significantly after it was filed.[1] The failure of Petitioner to comply with the service requirements in 40 C.F.R. §§ 124.19(i)(3) and (4) may also be grounds for the Board to deny review of Petition #2.[2] A 60 day extension would allow the Region to provide, if necessary, an adequate response to Petition #2 and will not prejudice the Petitioner's substantive claims. For the reasons set forth above, and as explained in greater detail below, the Region respectfully requests that its Motion to Deny Review of Petition #2 be granted and that the Board deny the Petition.

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[1] The Board acknowledged this deficiency in an email to Petitioner dated August 26, 2013, that stated, "This is to inform you that the Environmental Appeals Board received your Petition for Review on August 19, 2013, and the certificate of service was not included. Please be mindful that it is your resposibility [sic] to serve the petition for review and all further documents on all parties. If you have any questions, please feel free to call or email me."

[2] In the Remand Order, the Board explicitly notified Petitioner that any new petitions, "should follow the latest version of § 124.19 in preparing a petition for review." *In re Chevron Michigan*, slip op at 17, note 12.

II. INTRODUCTION

Petitioner filed Petition #2 on August 19, 2013, with the Board. Petition #2 seeks review of the Region's decision to issue a final Class II underground injection control ("UIC") permit to Chevron Michigan, LLC of Traverse City, MI ("Chevron") under the Safe Drinking Water Act ("SDWA"). Attachment B-1.

This is the second time that Region 5 has issued Permit No. MI-009-2D-0217 to Chevron Michigan, LLC and the second time that this Petitioner has filed a petition seeking the Board's review of Permit No. MI-009-2D-0217. In response to the Petitioner's prior petition dated September 16, 2012 [hereinafter Petition #1], the Board issued a Remand Ordered in *In re Chevron Michigan, LLC of Traverse City, Michigan*, UIC Appeal No. 12-01 (EAB Mar. 5, 2013). Attachment B-2. In *Chevron*, the Board denied review of all of the Petitioner's substantive claims. *Id.* at 1, 2, and 16. The Board remanded the final permit decision only to correct the limited procedural concerns identified in the administrative record – specifically, the seriatim issuance of comment response letters, some of which postdated the permit issuance date and signature of the comment response letter by someone other than the decision-maker. *Id.* at 1, 2, and 16. The Board's Remand Order gave the Region two options for addressing the procedural issues it identified. *Id.* at 16-17. The Region followed the second option: to "reconsider and reissue a final permit decision based on the complete administrative record including the final response to comments document." *Id.* at 17. Pursuant to the Board's Remand Order instructions, the Region complied with 40 C.F.R. §§ 124.17 and 124.18 by issuing one comprehensive response to comments document at the same time that the final permit decision was issued. Attachments B-3 and B-1. All of the public comments and

responses to those comments were considered by the decision maker, Tinka Hyde, Water Division Director, for U.S. EPA, Region 5, as part of the decision to reissue the final permit. The final permit was reissued without any changes from the draft permit and is identical to the permit that was the subject of the Board's prior Remand Order. Both the comprehensive response to comments document and the final permit decision were reviewed, signed, and dated by the decision maker on July 25, 2013. Both documents were also issued and placed in the mail on July 25, 2013.[3] Attachments B-4 and B-5. The comprehensive response to comments consisted of all of the five prior individual response to comment letters, combined almost verbatim into a single document.[4]

Most significantly for purposes of this current motion, the Board stated in the *Chevron* Remand Order that in any subsequent petitions, "No new issues may be raised that could have been raised, but were not raised, in the present appeal." *Id.* at 18. In Petition #2, Petitioner raises five issues that could have been raised in her prior appeal, but were not -- two of which also were not raised in any public comments and merely object to the existing regulations. For the reasons

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[3] *In re Chevron Michigan*, slip op at 13 note 10 ("The most straightforward way to avoid creating unnecessary ambiguity in the administrative record is, in the future, for the permit issuer to issue both the permit and all the responses to comments on the same date and assure that the certified administrative record reflects these dates.").

[4] In the new comprehensive Response to Comments #2, dated July 25, 2013, the prior individual responses to each of the five public commenters appear as follows: responses to Peter Bormuth are comments/responses 1-3 (Attachment B-8); responses to Monica Nemecek are comments/responses 4-6 (Attachment B-9); responses to Lawrence and Sandra Nemecek are comments/responses 7-9 (Attachment B-10); responses to Lucille Lercel are comments/responses 10-11 (Attachment B-11); and responses to Petitioner Norma Petrie are comments/responses 12-18 (Attachment B-7).

The Region notes that while the substance of each individual response was copied verbatim from the prior individual response comment letters into the Response to Comment #2, it was changed slightly by adding sequential numbers for the comments and harmonizing the introductory phrase to each comment along the lines of replacing, "One of your comments expressed. . ." with, "Commenter expressed . . . ." *E.g.* Compare response 1 to Petitioner in Response to Comment #1 to response 12 to Petitioner in Response to Comment #2. Attachments B-7 at 9 and B-3 at 2.

set forth below, Region 5 respectfully requests that the Board grant the Region's Motion to Deny Review of Petition.[5]

III. FACTUAL AND PROCEDURAL BACKGROUND

On January 18, 2012, Region 5 received Chevron's UIC permit application, dated January 10, 2012, and on April 6, 2012, Region 5 received a revised permit application. These applications were for Chevron to drill and operate a Class II well for the purpose of noncommercial brine disposal from production wells owned or operated by Chevron.

On May 24, 2012, Region 5 issued the draft Chevron permit. Region 5 received public comment on the draft from May 29 through June 28, 2012. Petitioner provided timely written comments to Region 5 on June 4, 2012, by email and mail.[6] Attachment B-6. In her written public comments, Petitioner raised six concerns to support her recommendation that Region 5 deny the permit, including: 1) general risks of drinking water contamination and associated health concerns; 2) the distance from the drinking well to the injection well; 3) risks of increased seismic activity; 4) whether there was any history of fluid and radiation leakage from similarly constructed wells; 5) the chemical composition of the injected brine; and 6) increased noise and vehicle traffic. *Id.* In an addendum to her comments, also dated June 4, 2012, Petitioner requested that Region 5 order Chevron to monitor the water quality of her drinking water well and to plant foliage at her property line to act as a sound barrier. *Id.* Following the thirty-day public comment period on the Chevron draft permit, Region 5 signed UIC Class II

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[5] *See In re Peabody W. Coal Co.*, CAA Appeal No. 10-01, slip op. at 7 (EAB Aug. 13, 2010), 14 E.A.D. ___ ("In the part 124 context, despite the lack of detailed procedures in the regulations, the Board has exercised broad discretion to manage its permit appeal docket by ruling on motions presented to it for various purposes . . . .")

[6] Petitioner's mailed public comments were received by EPA on June 7, 2012.

Permit #MI-009-2D-0217 to Chevron, with the same provisions and requirements that were in the draft permit. On August 21, 2012, Region 5 mailed a five-page detailed response to comment letter to Petitioner [hereinafter Response to Comment #1] that addressed each of the issues raised in her public comments. Attachment B-7.

On September 28, 2012, the Board received Petitioner's Petition #1, dated September 16, 2012. Attachment B-2. Petitioner's Petition #1 consisted of only two sentences. *Id.* The first sentence referenced the permit, and the second sentence stated, in its entirety, "I believe this decision is based on tenuous knowledge of the relationship between injection wells and underground drinking water and that the EPA has an imperative to protect and defend our water sources as a matter of policy and that an administrative review is in order to bring recent scientific evidence to the panel." *Id.* Region 5 filed a Response to Petition #1 on November 20, 2012. The Board issued a Remand Order on March 5, 2013. Pursuant to that Remand Order, Region 5 reissued a final permit and comprehensive response to comments on July 25, 2013 [hereinafter Response to Comments #2]. Attachment B-3. All public comments and responses to comments were considered by the decision maker in her decision to issue the final permit. The prior separate response to comments letters that were sent out individually were copied verbatim into a single combined response to comments that was sent to each public commenter.[7]

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[7] In the new comprehensive Response to Comments #2, dated July 25, 2013, the prior individual responses to each of the five public commenters appear as follows: responses to Peter Bormuth are comments/responses 1-3 (Attachment B-8); responses to Monica Nemecek are comments/responses 4-6 (Attachment B-9); responses to Lawrence and Sandra Nemecek are comments/responses 7-9 (Attachment B-10); responses to Lucille Lercel are comments/responses 10-11 (Attachment B-11); and responses to Petitioner Norma Petrie are comments/responses 12-18 (Attachment B-7).

The Region notes that while the substance of each individual response was copied verbatim from the prior individual response comment letters into the Response to Comment #2, it was changed slightly by adding sequential numbers for the comments and harmonizing the introductory phrase to each comment along the lines of replacing, "One of your comments expressed. . ." with, "Commenter expressed . . . ." *E.g.* Compare response 1 to Petitioner in

Attachment B-3. The reissuing of the comprehensive Response to Comments #2 and the final permit was done to address the procedural concerns that were identified in the Remand Order. The Region made no changes to the final permit from the original draft permit; made no changes to the individual response to comments (other than consolidating them); and added no new documents to the administrative record other than Petition #1, the Remand Order, comprehensive Response to Comments #2, and the new unchanged final permit and transmittal letter.

Petitioner's seven public comments that were previously responded to in the individual Response to Comment #1 letter, dated August 21, 2012, are now numbered comments and responses 12 through 18 in the Response to Comments #2, dated July 25, 2013. Attachments B-7 and B-3. Petitioner filed the current Petition #2 on August 19, 2013. Region 5 files this Motion to Deny Review of Petition #2 pursuant to 40 C.F.R. § 124.19.

IV. STANDARD OF REVIEW

The Board stated in its prior Remand Order in this matter that after the Region completed its actions on remand that the public comment period is not reopened, and that any new petitions seeking Board review, "shall be limited to those issues addressed by the Region on remand or raised by or in connection with the remand procedures." *In re Chevron Michigan*, slip op at 17-18. The Board went on to identify clearly that, "No new issues may be raised that could have been raised, but were not raised, in the present appeal." *Id.* at 18. In this matter, if Petitioner

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Response to Comment #1 to response 12 to Petitioner in Response to Comment #2. Attachments B-7 at 9 and B-3 at 2.

does not meet this standard, then her Petition #2 should be dismissed without conducting any further analysis.

V. ARGUMENT

In Petition #2, Petitioner is attempting to do precisely what the Board prohibited in its Remand Order – that is, to raise new issues in Petition #2 that could have been raised in Petition #1, but were not raised. The Board denied all of Petitioner's substantive claims, and did not intend to give the Petitioner a second opportunity to raise substantive arguments that the Petitioner could have raised in Petition #1 but failed to raise or did not raise with sufficient specificity. The Remand was specifically limited to "issues addressed by the Region on remand or raised by or in connection with the remand procedures." *Id.* at 17-18. The Region addressed no new substantive issues on remand; thus – per the Remand Order – any new petition must be limited to those issues raised in connection with the remand procedures – specifically, whether EPA adequately addressed the procedural concerns that were the basis of the remand. As discussed in more detail below, the Region followed the Board's specific instructions for correcting the procedural concerns, by creating an administrative record that provided a single comprehensive response to comments that was reviewed, considered, signed, dated, and issued by the decision maker at the time that the final permit decision was reissued. The Petitioner's attempt to now raise new substantive issues that could have been raised, but were not raised in Petition #1, is inconsistent with the Board's Remand Order.

Petitioner raises in Petition #2 five issues, all of which could have been raised in her prior Petition #1. The five issues that Petitioner currently raises are: (1) the Region's statements that there "should" be no connection between the injection well and drinking water wells is

inappropriate and indicates a need for more study; (2) additional scientific and geological evidence should be presented to support the safety of permitted injection wells and the geology of the area of the well; (3) the Region's statement that "there are no documented cases of seismic activities occurring in Antrim County" is questionable where research indicates a presence of a fault line; (4) current well regulations are "irresponsible"; and (5) lack of existence of regulations governing the surface distance of injection wells from drinking water wells is not justified. Issues 1 – 3 were each discussed in Response to Comment #1 that Petitioner was sent on August 21, 2013, and therefore certainly could have been raised in her prior Petition #1. Issues 4 and 5 appear to be general disagreements with the existing regulations which were not discussed in any of the public comments submitted by any of the five commenters, and therefore cannot be raised in a permit appeal. 40 C.F.R. § 124.19(a). Moreover, even if the public comments could be construed to have raised these issues, the Petitioner could have and should have raised such issues in Petition #1 – as there are no new substantive issues that arise out of this remand. Finally, challenges to existing regulations are not part of a determination as to whether a permit issuance was properly issued. Each of these issues could have been raised in the prior Petition #1, but were not, and according to the Board's Remand Order, this Petition #2 should be dismissed.

Issue 1 is an objection to the use of the word "should" in several of the comment responses (e.g., "As a result, there should be no connection between the injection well and nearby drinking water wells or surface waters.").[8] This exact sentence, and very similar

[8] The exact same sentence appears in response 4 of Response to Comment #2. Attachment B-3 at 4-5. Similar sentences appear in several other comments. In response 1 of Response to Comment #2, the sentence appears as, "As a result, there should be no effect on nearby drinking water wells from the operations of this injection well." Attachment B-3 at 3. In responses 7 and 10, the sentence appears as, "As a result, there should be no connection

variations of it, that Petitioner is objecting to in the reissued Response to Comment #2 appeared in the initial Response to Comment #1 to Petitioner, which she received before her previous Petition #1. Attachment B-7 at 2. This exact same sentence also appeared in Response to Comment #2 (see response 12), which was an exact repeat from Response to Comment #1, which was sent to Petitioner before her prior Petition #1. *Compare* Attachment B-3 at 9-10 to Attachment B-7 at 2. EPA's action on remand did not raise any new substantive issues that could not have been raised in the earlier Petition #1. Accordingly, Petitioner could have raised this issue in Petition #1 but failed to do so with sufficient specificity, and therefore it may not be raised in the present appeal pursuant to the Remand Order. *In re Chevron Michigan*, slip op at 18.

Issue 2 is a request for additional scientific and geologic evidence on the safety of injection wells and the geology of the well site. While Petitioner cites to response 4 in Response to Comments #2 in her current Petition #2, the identical information, for the most part verbatim, was presented in Response to Comment #1, and accordingly could have been raised in Petition #1; thus EPA's action on remand did not raise any new substantive issues that could not have been raised in the earlier petition.[9] Attachment B-7 at 2-3, and 1. Accordingly, Petitioner could have raised this issue in Petition #1 and therefore it may not be raised in the present appeal pursuant to the Remand Order. *In re Chevron Michigan*, slip op at 18.

Issue 3 questions the Region's statement on seismic activity and vaguely cites to a

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between the injection well and nearby drinking water wells." *Id.* at 7 and 8. In Responses 9 and 11, the sentence appears as, "As a result, there should be no connection between the injection well and nearby drinking water wells and local streams and rivers." *Id.* at 7 and 9.

[9] EPA notes that these responses to Petitioner from Response to Comment #1 were provided verbatim in Response to Comment #2. Attachment B-3 at 9-10 (see responses 12 and 13); and Attachment B-7 at 2-3 (see responses 1 and 2).

document without providing its title, but only providing the authors and year of publication. Petitioner submitted a public comment on seismicity, asking, "Is there a possibility this type of brine disposal may be linked to seismic activity?" Attachment B-6. The Region provided her a response on seismicity in Response to Comment #1 and therefore she could have raised this issue and the study in her prior Petition #1. Attachment B-7 at 3. Accordingly, this issue which could have been raised previously may not be raised in the present appeal pursuant to the Remand Order. *In re Chevron Michigan*, slip op at 18.

Issues 4 and 5 appear to be general disagreements with the existing regulations for underground injection. These issues were not discussed in any of the public comments submitted by any of the five commenters, and therefore cannot be raised in a permit appeal. 40 C.F.R. § 124.19(a). Moreover, even if the public comments could be construed as having raised these issues, Petitioner could have and should have raised these issues in her earlier Petition #1 – as there are no new substantive issues that arise out of this remand, which has addressed only the procedural deficiencies identified with respect to the earlier issuance of the permit. Finally, challenges to existing regulations cannot be raised in the context of a permit appeal.[10] *See In re Tondu Energy Co.*, 9 E.A.D. 710, 715 (EAB 2001) ("As we have repeatedly stated, permit appeals are not appropriate fora for challenging Agency regulations."); *In re City of Irving*, 10 E.A.D. 111, 124 (EAB 2001) ("[W]e have repeatedly recognized that the regulations authorizing appeals to the Board contemplate review of *conditions* of permits, not review of the statutes and regulations which are predicates for such conditions." (emphasis in original)); and *In re USGen*

[10] The regulations at 40 C.F.R. §§ 144.31 and 146.24 set forth the criteria and information EPA must consider before making a Class II UIC permitting decision. The Board has clearly stated that, "EPA's inquiry in issuing a UIC permit is limited solely to whether the permit applicant has demonstrated that it has complied with the federal regulatory standards for issuance of the permit." *In re Beckman Prod. Serv.*, 5 E.A.D. 10, 23 (EAB 1994).

New England, Inc. Brayton Point Station, 11 E.A.D. 525, 555 (EAB 2004) ("Significantly, the regulations governing the Board's review of permits authorizes the Board to review *conditions* of the permit decision, not statutes or regulations which are the predicates for such conditions." (emphasis in original)). Additionally, in Issue 5, Petitioner cites to responses 13, 15, 16, and 17 from Response to Comments #2, which are the exact same verbatim responses that were previously sent to Petitioner in Response to Comment #1. Attachment B-7. Issues 4 and 5 could have been raised in Petition #1 and therefore may not be raised in the present appeal pursuant to the Board's prior Remand Order. *In re Chevron Michigan*, slip op at 18.

As explained above, Petitioner could have raised all five of the issues in Petition #2 in her prior Petition #1 and accordingly they may not be raised now; therefore Petitioner's request for administrative review should be denied for failure to satisfy the standard provided by the Board in its Remand Order and the Region's Motion to Deny Review of Petition should be granted.

VI. CONCLUSION

For the reasons set forth above, the Region respectfully requests that the Board grant its Motion to Deny Review of Petition. However, if the Board denies this motion, the Region respectfully requests a 60 day extension of time for the Region to file a substantive Response to the Petition.

Respectfully submitted,

Dated: September 12, 2013

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