UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
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REPLY TO THE ATTENTION OF:
C-14J

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

Re: Cherry Berry B1-25 SWD (Permit Number: MI-055-2D-0042)
Appeal Number UIC 09-02
Response to Petition for Review

Dear Ms. Durr:

Enclosed please find the original and two copies of the Response to Petition for filing by the United States Environmental Protection Agency, Region 5 in the above-referenced matter. The certified index of the administrative record requested in your November 16, 2009, correspondence is included as Appendix A. Tabs 1 through 13 of Appendix B are relevant portions of the administrative record referenced in the Response to Petition.

Sincerely,

Ann L. Coyle
Associate Regional Counsel

Enclosures

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

2009 DEC 15 PM 2:17
ENVIR. APPEALS BOARD

In re:	)	
	)	Appeal No. UIC 09-02
O.I.L. Energy, Inc.	)	
Cherry Berry B1-25 SWD	)	
UIC Permit No. MI-055-2D-0042	)	
	)	

RESPONSE TO PETITION FOR REVIEW

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INTRODUCTION

The U.S. Environmental Protection Agency, Region 5 (Region 5 or the Region), hereby responds to the "Appeal of U.S. EPA Final Decision Regarding Permit #MI-005-2D-0042, Cherry Berry B1-25 SWD, Class II Injection Well, NW ¼, SW ¼, NW ¼, Section 25, T28 R10W, Acme Township, Grand Traverse County, Michigan" (Petition for Review) filed by Grobbel Environmental & Planning Associates L.L.C. (Grobbel) (Appeal No. UIC 09-02). Attachment B-1. Grobbel appealed Region 5's decision to issue, under the Safe Drinking Water Act, a final Class II underground injection control permit to O.I.L. Energy Corp. (OEC) for the Cherry Berry B1-25 SWD. In its Petition for Review, Grobbel contends that the Region based its decision to issue the permit on erroneous findings of fact. For the reasons set forth below, Region 5 recommends that the Environmental Appeals Board (the Board) deny Grobbel's Petition for Review.

FACTUAL AND PROCEDURAL BACKGROUND

Congress enacted the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300f *et seq.,* in 1974 to ensure that the nation's sources of drinking water are protected against contamination. Part C of SDWA, 42 U.S.C. §§ 300h - 300h-8, established a regulatory program "to prevent underground injection which endangers drinking water sources." 42 U.S.C. § 300h(b).[1] Among other things, the SDWA directed EPA to promulgate regulations containing minimum requirements for state underground injection control (UIC) programs, 42 U.S.C. § 300h,[2] and required all states identified by EPA to submit UIC programs meeting those minimum requirements. 42 U.S.C. § 300h-1.[3] In states where EPA has not approved a UIC program, EPA

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[1] EPA regulates five classes of wells pursuant to this mandate. *See* 40 C.F.R. § 144.6.

[2] EPA promulgated initial regulations to implement these statutory provisions in the early 1980s. *See* 45 Fed. Reg. 42,472 (June 24, 1980) (codified, as amended, at 40 C.F.R. Part 146) (technical well criteria and standards); 48 Fed. Reg. 14,146 (Apr. 1, 1983) (codified, as amended, at 40 C.F.R. Parts 144-146) (UIC program rules); 49 Fed. Reg. 20,138 (May 11, 1984) (codified, as amended, at 40 C.F.R. Parts 144 and 147) (EPA-administered UIC programs).

directly implements its own regulations for the UIC program. The State of Michigan (Michigan) has not been approved to administer the UIC permit program; therefore, EPA administers the UIC permit program within Michigan. 40 C.F.R. § 147.1151.

On October 20, 2008, Region 5 received OEC's Class II UIC permit application for the Cherry Berry B1-25 SWD, a proposed underground injection well located in Grand Traverse County, Michigan. In its permit application, OEC sought to inject a maximum of 3,000 barrels per day of noncommercial brine, using a gravity-fed system, into a Dundee rock formation.[4] Attachment B-2. OEC proposed that the well be built out of three steel pipe casing strings, one inside the other, with each tube of pipe encased in cement. *Id.* at Attachments L and M. OEC proposed to drill the well to approximately 2,130 feet below ground surface. *Id.* at Attachment G. The top of the proposed injection zone is approximately 1,920 below the ground surface, with an impermeable confining zone immediately above the injection zone. *Id.* The base of the lowermost underground source of drinking water (USDW) is approximately 415 below the ground surface. *Id.* at Attachment E. There are approximately 1,505 feet of sedimentary rock between the lowermost depth of the USDW and the top of the proposed injection zone. *Id.* Directly above the proposed injection zone is a 105 foot layer of Bell Shale, a type of highly impermeable sedimentary rock. *Id.* at Attachment G.

On February 18, 2009, Region 5 issued the draft Cherry Berry B1-25 SWD permit. Attachment B-3. The Region received public comment on the draft permit from February 18 through March 20, 2009, and then extended the public comment period through June 3, 2009, to

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[3] *See also* 40 C.F.R. § 144.1(e) (requiring all 50 states to submit UIC programs).

[4] The Cherry Berry B1-25 SWD is not the first OEC UIC well permitted by Region 5 in Michigan. OEC currently holds a Class II UIC permit for the Hubbell B1-9 SWD, which also is located in Grand Traverse County, Michigan. Concurrent with the Class II permit application for the Cherry Berry B1-25 SWD, OEC applied for a permit to reclassify the Hubbell B1-9 SWD as a Class I non-hazardous injection well that will receive cherry processing and other wastes. Although Region 5 received comment on both permits, during separate sessions, at the public hearing on May 19, 2009, the Hubbell B1-9 SWD reclassification application is entirely independent of this permitting action.

accommodate requests for a public hearing. Region 5 held a public hearing on the draft permit on May 19, 2009. After considering all of the comments it received on the draft permit, Region 5 issued the final permit for the Cherry Berry B1-25 SWD on October 9, 2009. Attachment B-7.

Grobbel provided written comments to Region 5 on May 9, 2009, and revised written comments on May 19, 2009. Attachments B-4 and B-5. The recommendations contained in both sets of comments are identical. *Id.* In its written comments, Grobbel made three recommendations, that EPA deny the permit: 1) until OEC provided a surface facility and containment plan to EPA for consideration and review; 2) until EPA obtained groundwater monitoring data; and 3) effectively requiring OEC to use its existing, Hubbel B1-9 SWD Class II UIC well. *Id.* at 6-7. Grobbel provided oral comments at the public hearing on May 19, 2009. These comments identified some of the same factual issues as Grobbel's written comments, but focused on the inter-relatedness of OEC's two permit applications. Attachment B-6 at 21-26.

Grobbel timely filed its Petition for Review of the Cherry Berry B1-25 SWD Class II UIC permit with the Board. The Region is filing this Response to Petition for Review in accordance with the Board's November 16, 2009, letter to Region 5.

STANDARD OF REVIEW

Under its regulations, the Board must decline review of an EPA permitting decision unless it finds that EPA's decision was based on a "clearly erroneous" finding of fact or conclusion of law, or "[a]n exercise of discretion or an important policy consideration which the Environmental Appeals Board should, in its discretion, review." 40 C.F.R. § 124.19(a); *see In re Environmental Disposal Sys., Inc.,* 12 E.A.D. 254, 263 (EAB 2005). The preamble to 40 C.F.R. § 124.19 states that "this power of review should only be sparingly exercised" and that "most

permit conditions should be finally determined at the Regional level."[5] 45 Fed. Reg. 33,412 (1980). *See In re Environmental Disposal Sys., Inc.,* 12 E.A.D. at 263-64; *See In re NE Hub Partners, L.P.,* 7 E.A.D. 561, 567 (EAB 1998), citing *In re Federated Oil & Gas of Traverse City, Michigan,* 6 E.A.D 722, 725 (EAB 1997). The petitioner bears the burden of proving that review is warranted. 40 C.F.R. § 124.19(a); *see also In re Environmental Disposal Sys., Inc.,* 12 E.A.D. at 264; *In re Federated Oil & Gas of Traverse City, Michigan,* 6 E.A.D at 725.

The Board interprets 40 C.F.R. § 124.19(a) as requiring the petitioner to clearly identify the conditions in the permit at issue and the bases in the record for arguing clear error in the permit condition decision; or requiring the petitioner to clearly identify the Region's exercise of permit decision discretion or the policy considerations that warrant the Board's discretion to grant review of the permit condition, and the bases for the Board to exercise that discretion. *In re LCP Chemicals - New York,* 4 E.A.D. 661 (EAB 1993).

In addition, "on appeal, it is not sufficient to repeat objections made during the public comment period; rather, a petitioner must also demonstrate why the permit issuer's response to those objections (i.e., the permit issuer's basis for its decision) is clearly erroneous." *In re Dominion Energy Brayton Point, LLC,* 12 E.A.D. 490, 509 (EAB 2006). As noted in *In re Peabody W. Coal Co.,* "the petitioner may not simply reiterate comments made during the public comment period, but must substantively confront the permit issuer's subsequent explanations." *In re Peabody W. Coal Co.,* 12 E.A.D. 22, 33, 46 n.58 (EAB 2005); *see also In re Knauf Fiber Glass, GmbH,* 9 E.A.D. 1, 5 (EAB 2000) ("Petitions for review may not simply repeat objections

[5] EPA's regulations apply both to EPA and to States with approved UIC programs, and Parts 124 and 144 frequently use the generic term "Director" to describe the EPA Regional Administrator or the State agency director with specific UIC program oversight in a state. *See* 40 C.F.R. §§ 124.2, 144.3 ("Definitions" (*Director*)). Because EPA retains UIC oversight in the State of Michigan, where appropriate, the summary of the relevant regulatory text replaces the word "Director" with the term "U.S. EPA." Moreover, the Regional Administrator's authority to deny, transfer, modify, revoke, reissue and terminate UIC permits has been duly delegated to the Director, Water Division, U.S. EPA Region 5 under Regional Delegation 9-24 (February 1987), as authorized by U.S. EPA Headquarters Delegation 9-24. (June 8, 1984).

made during the comment period; instead they must demonstrate why the permitting authority's response to those objections warrants review.").

ARGUMENT

The Petition for Review filed by Grobbel fails on numerous fronts. To the extent Grobbel raised issues in the public comment period, it simply repeats those objections in its appeal; it fails to demonstrate how Region 5's response to those objections warrants review. Ultimately, Grobbel fails to establish that review of Region 5's permit decision is warranted by the Board.

In its appeal, Grobbel asserts that Region 5's decision to issue the Cherry Berry B1-25 SWD permit was based on clearly erroneous findings of fact and that "other findings by the U.S. EPA represent an exercise of discretion that warrant [sic] review by the Board." Attachment B-1 at 1. To support its appeal, Grobbel argues: 1) Region 5 failed to adequately demonstrate that it met its SDWA obligations to protect subsurface drinking water resources at the Cherry Berry B1-25 SWD; 2) Region 5 failed to adequately assess OEC's need for the Cherry Berry B1-25 SWD, including evaluating existing alternatives to accommodate OEC's safe disposal of waste brine; and 3) Region 5 failed to adequately assess OEC's ultimate intended use of the Cherry Berry Bl-25 SWD. Attachment B-1. As discussed in greater detail below, none of the issues Grobbel identifies describe a Region 5 permit decision finding of fact that is clearly erroneous or identifies an EPA exercise of discretion that the Board should, in its discretion, review.

1. Grobbel Fails to Establish Why Region 5's Response to Grobbel's Comments on the Draft Permit Warrants Review.

As noted above, when filing an appeal, a Petitioner may not simply repeat the objections it raised during the public comment period; rather, it must demonstrate why the permit issuer's response to those objections is clearly erroneous. *See In re Dominion Energy Brayton Point,*

LLC, 12 E.A.D. at 509; *In re Peabody W. Coal Co.,* 12 E.A.D. at 33, 46 n.58; *In re Knauf Fiber Glass, GmbH,* 9 E.A.D. at 5.

Grobbel's Petition for Review is a classic example of an appeal that simply repeats claims previously made by the petitioner. In its May 19, 2009, comment, Grobbel states:

> A surface facility plan has not been provided to the U.S. EPA for the evaluation of this proposed permit. Specifically, a surface facility plan, including plans to contain and prevent surface spillage, pipeline loss or other potential releases to the environment from production brine waste conveyance, has apparently not yet been provided for public or U.S. EPA evaluation or review. Based on our experience, such plans are fundamental to adequately assess potential environmental risk from proposed deep injection well facilities.... *It is recommended and strongly urged that the U.S. EPA in fulfilling its Safe Drinking Water Act obligations to protect subsurface water resources deny this permit until such surface facility and containment plans are disclosed by the applicant. Such plans would enable the U.S. EPA to verify appropriate engineering design and operation and maintenance practices to protect drinking water at and downgradient of the proposed well site, and within all storage and conveyance apparatus or practices, i.e., above ground tanks, pipelines, truck on-loading and off-loading, truck routes, on-site truck circulation, etc.* Attachment B-5 at 6. (emphasis in the original)

In the Petition for Review, Grobbel states:

> [A] surface facility plan, including plans to secondarily contain and prevent surface spillage, pipeline loss or other potential releases to the environment from production brine waste conveyance, has apparently not yet been provided for public or U.S. EPA evaluation or review prior to approval of the subject permit. Based on our experience, such plans are fundamental to adequately assess potential environmental risk from proposed deep injection well facilities. *Such plans would have enabled the U.S. EPA to verify appropriate engineering design and operation and maintenance practices to protect drinking water at and downgradient of the proposed well site, and within all storage and conveyance apparatus or practices, i.e., above ground tanks, pipelines, truck on-loading and off-loading truck routes, on-site truck circulation, etc.* Attachment B-1 at 2. (emphasis in the original)

Similarly, in its May 19, 2009, comments, Grobbel states:

> Plans previously provided by the applicant to the MDEQ indicate that it owns mineral rights and owns/operates and plans to expand an existing natural gas well and pipeline network (i.e., O.I.L. Energy Corps' Acme 18,

> Acme 25, Acme 31 and Whitewater 9 Antrim natural gas production units) that lead to its central production facility (CPF) within Section 9, Acme Township. [footnote omitted] This CPF facility includes an existing brine deep disposal well (i.e. the Hubbell B1-9 SWD),... [I]t is recommended and strongly urged that the U.S. EPA deny the subject permit application, in effect requiring the O.I.L. to continue with its ongoing plan to use the existing Hubbell B1-9 SWD deep well for production waste. Attachment B-5 at 7.

Then, in the Petition for Review, Grobbel states:

> Plans provided by the Applicant to the MDEQ indicate that it owns mineral rights, and owns/operates and plans to expand an existing natural gas well and pipeline network (i.e. O.I.L. Energy Corps' Acme 18, Acme 25, Acme 31 and Whitewater 9 Antrim natural gas production units) that leads to a central production facility (CPF) within Section 9, Acme Township. [footnote omitted] This CPF facility includes an existing brine deep disposal well (i.e. the Hubbell B1-9 SWD). It is therefore recommended and strongly urged that the Cherry Berry UIC permit be vacated. The reversal of the U.S. EPA's decision on the Cherry Berry well permit would have the effect requiring the Applicant to continue with its ongoing plan to use the existing Hubbell B1-9 SWD deep well for natural gas production waste ... Attachment B-1 at 2-3.

In both these examples, the difference between the two statements is temporal; one refers to what Grobbel wanted Region 5 to do, the other notes the effect ("should" versus "would have") that the issue would have had, had Region 5 adopted Grobbel's recommendation. There is no substantive difference between the statements. Grobbel does not even acknowledge the Regions's Response to Comments in its Petition for Review, nor does Grobbel identify how Region 5's decision not to accept its recommendations was clearly erroneous or an exercise of discretion that warranted review by the Board. *Id.*

Grobbel failed to demonstrate how EPA's response to its comments on the draft permit were clearly erroneous; therefore, the Board should deny the Petition for Review.

2. Region 5 Met Its Obligations under SDWA to Protect Subsurface Drinking Water Resources at the Cherry Berry B1-25 SWD.

a. Grobbel does not identify an issue with a permit condition related to Region 5's fulfillment of its obligations to protect subsurface drinking water resources at the Cherry Berry B1-25 SWD.

When petitioning for review of a UIC permit decision under 40 C.F.R. § 124.19(a), the Board requires a petition to meet two components for consideration on the merits: "(1) clear identification of the conditions in the permit at issue, and (2) argument that the conditions warrant review." *In re Beckman Prod. Serv.*, 5 E.A.D. 10, 18 (EAB 1994). As noted above, the Board has taken the position that it should exercise its discretion to review UIC permit actions "sparingly" and that "most permit conditions should be finally determined at the Regional level." *Environmental Disposal Sys.*, 12 E.A.D. at 263-64.

Grobbel alleges that Region 5 failed to adequately demonstrate that it fulfilled its SDWA obligations to protect subsurface drinking water sources at the Cherry Berry B1-25 SWD. Attachment B-1 at 1-2. To support this allegation, Grobbel suggests that Region 5 should have had available for review and evaluated a surface facility plan prior to approval of the proposed permit. *Id.* It does not, however, assert that such a plan should have been incorporated into the final permit. *Id.* Grobbel fails to identify a permit condition that is at issue; therefore, the Board should deny this portion of Grobbel's Petition for Review.

b. Grobbel fails to identify a clearly erroneous finding of fact related to Region 5's fulfillment of its obligations to protect subsurface drinking water resources at the Cherry Berry B1-25 SWD.

Assuming Grobbel intended that the surface facility plan it recommends be included as a condition in OEC's UIC permit for the Cherry Berry B1-25 SWD, Grobbel nonetheless fails to identify a finding of fact to Region 5's evaluation of the subsurface drinking water resources at the Cherry Berry B1-25 SWD that is clearly erroneous. Grobbel sets forth a series of facts

regarding the locations of nearby water supplies, the make-up of the soil in the area, the downgradient residential use of groundwater and the slope of the nearby ground. *Id.* However, Grobbel makes no argument that the Region made erroneous findings of fact. Instead, Grobbel simply states, "EPA failed to adequately demonstrate its fulfillment of its [SDWA] obligations to protecting subsurface drinking water resources" and then proceeds to describe various facts about the area surrounding the proposed well. *Id.* Grobbel does not met its burden of demonstrating that Region 5 made clearly erroneous findings of fact related to these statements; therefore, the Board should deny this portion of Grobbel's Petition for Review.

Assuming, again, that Grobbel intended to allege the Region failed to consider the facts described in its public comments and restated in its Petition for Review, Attachments B-4, B-5 and B-6 at 21-26, and B-1, respectively, Grobbel again fails to meet its burden of proof. 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. In accordance with those requirements, Region 5's review of the permit application included, but was not limited to: the location of the nearest USDW; the structural integrity of the proposed well; the construction plan for installing the well; the make up of the soil surrounding the well; the depth of the well and the various soil compositions; the type of fluid to be injected; monitoring and reporting requirements; and emergency and closure plans for the well. Attachments B-2, B-9 through B-13. In addition, the Region's Response to Comments document specifically addresses numerous public comments relating to the site location and geology. For example, Attachment B-8 at 6-9 reflects Region 5's consideration of the sort of facts Grobbel lays out in its comments and Petition for Review. Grobbel does not demonstrate how the Region's consideration of those facts was incorrect, nor does it provide any support for a conclusion that the Region failed to consider or erred in

considering these criteria through records, statements, or other evidence. Attachment B-1 at 1-2. Thus, Grobbel again fails to meet its burden of proving, based on clearly erroneous findings of fact, that Region 5 did not fulfill its SDWA obligations to protect subsurface drinking water resources and the Board should deny this portion of its Petition for Review.

c. Grobbel fails to identify an exercise of discretion related to Region 5's fulfillment of its obligations to protect subsurface drinking water resources at the Cherry Berry B1-25 SWD that warrants review by the Board.

Again assuming that Grobbel intended the surface facility plan it recommends to be included as a condition of the Cherry Berry B1-25 SWD Class II UIC permit, Grobbel fails to identify any exercise of discretion related to Region 5's fulfillment of its obligations under SDWA to protect subsurface drinking water resources at the Cherry Berry B1-25 SWD that warrants review by the Board. Grobbel asserts that if Region 5 had evaluated or reviewed a "surface facility plan," it would have enabled the Region to:

> verify appropriate engineering design and operating maintenance practices to protect drinking water at and downgradient of the proposed well side, and within all storage and convey apparatus or practices, i.e. above ground tanks, pipelines, truck on-loading and off-loading, truck routes, on-site truck circulation, etc. *Id.* at 2.

Grobbel presents this recommendation as if it is within Region 5's discretion to include such a plan within the permit review process. However, the Region's permit review authority is limited to the criteria identified in 40 C.F.R. §§ 144.31 and 146.24, which generally are related to the geological siting, well engineering, and operating and monitoring standards for deep injection wells.

The Board has clearly identified an EPA region's role in permitting underground injection wells. In *In re Beckman Production Services*, the Board stated: "EPA's inquiry in issuing a UIC permit is limited solely to whether the permit applicant has demonstrated that it

has complied with the federal regulatory standards for issuance of the permit." *In re Beckman Prod. Serv.*, 5 E.A.D. at 23. These criteria do not include the surface facilities and the other equipment Grobbel identified. Instead, the State of Michigan has authority over surface facilities at well sites. *See* MICH. ADMIN. CODE R. 324.1001 *et seq.* (1996). Michigan administrative rules require a UIC permittee to develop a secondary containment area, to conduct a hydrological study of the area and to construction a monitoring well down-gradient from the facility and to report surface spills and leakage. MICH. ADMIN. CODE R. 324.1002 and 324.1006. Because Region 5 does not have the legal authority to require a surface facility plan, Grobbel cannot and does not satisfy the burden of demonstrating that the Region exercised its discretion to exclude consideration of a surface facility plan that warrants Board review; therefore, the Board should deny this portion of Grobbel's Petition for Review.

3. Region 5 Is Not Required to Review Alternatives When It Reviews Class II UIC Permit Applications.

a. Grobbel fails to identify a clearly erroneous finding of fact in Region 5's assessment of OEC's need for the Cherry Berry B1-25 SWD.

Grobbel next argues that Region 5 failed to adequately assess OEC's need for the Cherry Berry B1-25 SWD. Grobbel asserts that if Region 5 had considered different alternatives to the proposed well, it would have concluded that there is no need to permit the Cherry Berry B1-25 SWD at all. Attachment B-1 at 2-3. Grobbel again fails to identify a finding of fact that is clearly erroneous.

As noted above, the Board recognizes that an EPA region's role in permitting underground injection wells "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. at 23. These criteria do not include consideration of whether

viable alternatives to a proposed well exist. The Region is limited to consideration of the soundness of the construction of the well as it relates to USDWs, not whether it is the best location for a proposed well or even whether the well is necessary to an applicant's operation.

As in its arguments in support of a surface facility plan, Grobbel asserts that Region 5 should have considered factual information outside the scope of the criteria it must evaluate as the UIC permit-issuing authority. Region 5 appropriately reviewed OEC's application for the Cherry Berry B1-25 SWD Class II UIC permit in accordance with the requirements of 40 C.F.R. §§ 144.31 and 146.24 and concluded that the geologic siting, well engineering, and operating and monitoring requirements had all been met. Attachment B-9. Grobbel fails to meet its burden of identifying an erroneous finding of fact relating to Region 5's evaluation of the UIC permit application for the Cherry Berry B1-25 SWD; therefore, the Board should deny this portion of Grobbel's Petition for Review.

b. Grobbel fails to identify an exercise of discretion related to Region 5's assessment of OEC's need for the Cherry Berry B1-25 SWD that warrants review by the Board.

Grobbel's argument related to whether Region 5 adequately assessed OEC's need for the Cherry Berry B1-25 SWD also can be interpreted as challenging whether Region 5 had exercised its discretion when it did not consider alternatives to permitting a new Class II UIC well. *See* Attachment B-1 at 2-3. This argument fails for the same reason that Grobbel could not demonstrate that Region 5 had made a clearly erroneous finding of fact—federal regulations do not require EPA to consider alternatives to a proposed Class II UIC well. *See* 40 C.F.R. §§ 144.31 and 146.24. Therefore, there is no exercise of discretion for the Board to review and the Board should deny this portion of Grobbel's Petition for Review.

4. EPA Is Not Required to Consider Potential Future Uses When It Reviews Class II UIC Permit Applications.

a. Grobbel fails to identify a clearly erroneous finding of fact related to Region 5's assessment of OEC's ultimate intended use of the Cherry Berry B1-25 SWD.

Finally, Grobbel asserts that Region 5 failed to adequately assess OEC's ultimate intended use of the Cherry Berry B1-25 SWD. Attachment B-1 at 3. Grobbel again raises issues outside the scope of EPA's permitting authority and does not identify a clearly erroneous finding of fact. Grobbel does not articulate what effect considering this potential use would have had on the Region's permitting decision, only that it is concerned that OEC may, one day, decide to change the use of the Cherry Berry B1-25 SWD. *Id.*

Grobbel contends that the owners of the Cherry Berry B1-25 SWD "may seek reclassification." *Id.* Yet OEC's permit application contains no indication of a plan to reclassify this well in the future. Attachment B-2. And, as noted above, "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. at 23. These criteria do not include consideration of hypothetical potential future uses of a proposed well. The Region is limited to consideration of the soundness of the construction of the well as it relates to USDWs, not business decisions an applicant might make at some unidentified future point in time.

In addition, all modifications to, or revocations and reissuances of, a Class II UIC permit are subject to the requirements at 40 C.F.R. §§ 124.5 and 144.39. As noted in Region 5's Response to Comments, Attachment B-8 at 5, Class I UIC wells typically have more stringent construction and permit compliance requirements than Class II UIC wells. *See* 40 C.F.R. § 144.32(g). To convert a Class II UIC well to a Class I UIC well, a permittee likely would be

required to submit to a new Class I UIC permit application, EPA would issue a draft permit, and the permit would be subject to public notice and comment opportunities. 40 C.F.R. § 124.6. Thus, a permit reclassification could not be accomplished "without the input of adjoining landowners or any public involvement" as alleged by Grobbel. Attachment B-1 at 3.

As in its previous arguments, Grobbel asserts that Region 5 should have considered factual information outside the scope of its UIC permit-issuing authority. Region 5 appropriately reviewed OEC's application for the Cherry Berry B1-25 SWD Class II UIC permit in accordance with the requirements of 40 C.F.R. §§ 144.31 and 146.24 and concluded that the geologic siting, well engineering, and operating and monitoring requirements were all met. Attachment B-9. Grobbel fails to meet its burden of identifying an erroneous finding of fact related to Region 5's evaluation of the UIC permit application for the Cherry Berry B1-25 SWD; therefore, the Board should deny this portion of Grobbel's Petition for Review.

b. Grobbel fails to identify an exercise of discretion related to Region 5's assessment of OEC's ultimate intended use of the Cherry Berry B1-25 SWD that warrants review by the Board.

Grobbel's argument related to whether Region 5 adequately assessed OEC's potential future use of the Cherry Berry B1-25 SWD also can be interpreted as challenging whether Region 5 had exercised its discretion when it did not consider potential future use of the well in its permitting decision. *See* Attachment B-1 at 3. This argument fails for the same reason that Grobbel could not demonstrate that Region 5 had made a clearly erroneous finding of fact or conclusion of law—federal regulations do not require EPA to consider potential future uses of a proposed Class II UIC well. *See* 40 C.F.R. §§ 144.31 and 146.24. Therefore, there is no exercise of discretion for the Board to review. The Board should deny this portion of Grobbel's Petition for Review.

CONCLUSION

Grobbel's Petition for Review does not present a finding of fact or conclusion of law that is clearly erroneous, nor does it identify an exercise of discretion or an important policy consideration that the Board should, in its discretion, review. Region 5 therefore respectfully requests that the Board deny the Petition for Review.

Respectfully submitted,

Ann L. Coyle
Associate Regional Counsel
U.S. Environmental Protection Agency, Region 5
77 West Jackson Boulevard (C-14J)
Chicago, Illinois 60604
Phone: (312) 886-2248
Fax: (312) 692-2117
Email: coyle.ann@epa.gov

Date: December 14, 2009

CERTIFICATE OF SERVICE

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

Christopher P. Grobbel, Ph.D.
Grobbel Environmetnal & Planning Associates L.L.C.
800 Cottageview Dr., Suite 211B
Traverse City, MI 49684

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

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

Dated this 14 day of December, 2009.

Rita Jackson
Secretary
Office of Regional Counsel
U.S. EPA Region 5