BEFORE THE ENVIRONMENTAL APPEALS BOARD

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C.

In re:	)	
Sunoco Partners Marketing	)	
& Terminals, LP	)	UIC Appeal No. 05-01
	)	
Docket No. MI-163-3G-A002	)	

ORDER DENYING REVIEW IN PART AND REMANDING IN PART

I. *INTRODUCTION*

On July 5, 2005, Environmental Disposal Systems, Inc. ("EDS") filed a petition for review with the Environmental Appeals Board ("Board") in which EDS challenges the Underground Injection Control ("UIC") permit U.S. Environmental Protection Agency ("EPA") Region V (the "Region") issued to Sunoco Partners Marketing & Terminals, LP ("SPMT") pursuant to the Safe Drinking Water Act ("SDWA"), 42 U.S.C. §§ 300h to 300h-8, and EPA's implementing regulations at 40 C.F.R. parts 124, 144, and 146-148. The permit authorizes SPMT to discharge freshwater through a Class III well[1] in order to enlarge four underground

[1] The UIC program's implementing regulations establish a classification system for injection wells depending on the material being injected into the well. Class III wells, which is the category relevant to this case, are used to inject fluids to extract minerals, including salts. *See* 40 C.F.R. § 144.6(c) and discussion *infra.*

caverns the company uses to store liquid petroleum gas ("LPG")[2] at its Inkster Road pipeline terminal and storage facility in Wayne County, Michigan ("Inkster Facility" or "Facility").[3]

II. *BACKGROUND*

A. *Statutory and Regulatory Framework*

SDWA section 1421, 42 U.S.C. § 300h, requires the Administrator to promulgate regulations for State underground injection programs in order to protect underground sources of drinking water ("USDW").[4] The EPA has promulgated such implementing regulations, which

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[2] SPMT's UIC permit application describes LPG handled by the company at its Inkster Road facility as including "propane, butane, isobutane, and a butane/butylene mixture." Administrative Record ("A.R.") No. 1 (UIC Permit Application ("Permit Application") (July 22, 2004) pt. U, at 3).

[3] The Region earlier issued to petitioner EDS two final UIC permits (October 18, 2004) for EDS' facility located a half-mile away from SPMT's proposed injection wells. The EAB denied review of these two Final UIC Permits in response to a petition for review filed by SPMT. *See In re Envtl. Disposal Sys., Inc.*, UIC Appeal Nos. 04-01 & 04–02, (EAB Sept. 6, 2005), 12 E.A.D. __.

[4] Specifically, the SDWA requires the Administrator to promulgate regulations establishing "minimum requirements for effective programs to prevent underground injection which endangers drinking water sources." SDWA § 1421(b)(1), 42 U.S.C. § 300h(b)(1).

EPA in turn has promulgated implementing regulations that define a USDW 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

are found at parts 144 through 149 ("UIC Regulations").[5] Notable for purposes of this case, EPA administers the UIC program in those states that are not yet authorized to administer their own programs. *See* 40 C.F.R. § 144.1(e). EPA remains the permitting authority of the UIC program in the State of Michigan. *See id.* § 147.1151.

The statute and regulations define "underground injection" as "the subsurface placement of fluids by well injection." 42 U.S.C. § 300h(d)(1). The UIC program classifies injection wells into five types, depending on the material that will be injected. The type of well pertinent to this case is a Class III well, which the regulations describe as a "[w]ell[] which inject[s] for extraction of minerals including * * * [s]olution mining of salts or potash." 40 C.F.R. § 144.6(c)(3).

Part 146 of the UIC regulations requires applicants for injection well permits to meet technical criteria and standards for the well type they seek to operate. Among these are the requirement that each well possess "mechanical integrity" ("MI") prior to operation.[6] *See id.*

(b) Which is not an exempted aquifer.

40 C.F.R. § 144.3.

[5] The purpose and scope of 40 C.F.R. parts 144 through 149 are as follows: part 144 (minimum requirements for the UIC program); part 145 (procedures for approving, revising, and withdrawing state programs); part 146 (UIC program criteria and standards); part 147 (applicable UIC programs for states, territories, and possessions); part 148 (hazardous waste injection restrictions) and part 149 (sole source aquifers). Part 146 is the most relevant to the instant case. *See* discussion *infra.*

[6] The UIC regulations provide, in relevant part, that "[t]he owner or operator of a * * * Class III well permitted under this part shall establish prior to commencing injection or on a schedule determined by the Director, and thereafter maintain mechanical integrity as defined in § 146.8 of this chapter." 40 C.F.R. § 144.51(q)(1).

§ 146.8. The regulations provide that an injection well has "mechanical integrity" if:

> (1) There is no significant leak in the casing,[7] tubing or packer;[8] and
>
> (2) There is no significant fluid movement into an underground source of drinking water through vertical channels adjacent to the injection well bore.

Id. § 146.8(a).

The UIC regulations prescribe testing methods for owners or operators of injection wells to evaluate whether the foregoing MI conditions are being met. To determine the absence of a "significant leak," the UIC regulations prescribe "pressure testing"[9] of the tubing and casing for

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[7] The UIC regulations define "casing" as:

> [A] pipe or tubing of appropriate material, of varying diameter and weight, lowered into a borehole during or after drilling in order to support the sides of the hole and thus prevent the walls from caving, to prevent loss of drilling mud into porous ground, or to prevent water, gas, or other fluids from entering or leaving the hole.

40 C.F.R. § 146.3.

[8] The UIC regulations define "packer" as a "device lowered into a well to produce a fluid-type seal." 40 C.F.R. § 146.3.

[9] The UIC program regulations describe the following forms of pressure testing for Class III wells to determine whether significant leakage exists:

> (1) Following an initial pressure test, monitoring of the tubing-casing annulus pressure with sufficient frequency to be representative, as determined by the Director, while maintaining an annulus pressure different from atmospheric pressure measured at the surface;
> (2) Pressure test with liquid or gas * * *.

Class III wells. *See id.* § 146.8 (b)(1)-(2). In order to determine whether there is "significant fluid movement," the UIC regulations require that Class III wells employ a temperature or noise log, or, where the log method is not feasible, "cementing records demonstrating the presence of adequate cement to prevent such migration." *See id.* § 146.8(c)(1),(3).

B. *Factual and Procedural Background*

On July 22, 2004, SPMT applied for a UIC Class III permit for the Inkster Facility to allow SPMT to inject fresh water into four existing caverns in order to enlarge the caverns' capacity for storing LPG. *See* Permit Application at 1. As described by the Region, SPMT would engage in the solution mining of a natural salt formation. The solution mining process would occur through four injection wells that would inject the water into caverns at depths between 1150 feet and 1800 feet below the ground surface. A.R. # 2 (Fact Sheet for Issuance of Underground Class III Permit – Solution Mining of Salt, Permit No. MI-163-3G-A002 (Mar. 11, 2005) ("Fact Sheet")) at 2. The injected freshwater would dissolve the natural salt formation over a period of several months, thereby enlarging the cavern. The dissolution process produces a saltwater brine solution, which would accumulate in the caverns. Deliveries of LPG, when pumped into the caverns for storage, would force out the brine, which would be stored in surface ponds. *See* Permit Application pt. N (Summary: Change of Injected Fluids), at D-3. The base of the lowermost possible USDW has been identified at approximately 220 feet below the ground

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40 C.F.R. § 146.8(b)(1)-(2).

surface. Fact Sheet at 1.

On March 11, 2005, the Region issued a public notice in which it stated its intention to issue a UIC Class III permit to SPMT. *See* A.R. No. 11 (Public Notice (March 11, 2005)). The public notice announced arrangements for making a draft UIC permit available to the public, as well as a 30-day public comment period beginning on the above date. *See id.*

During the comment period, the Region received only two letters commenting on the draft permit. One, from EDS' counsel, expressed objections to various aspects of the draft permit. *See* A.R. No. 14 (Letter from William C. Fulkerson, EDS, to Lisa Perenchio, Region V (Apr. 6, 2005)). The other was from Mr. David A. Bower, an attorney from River Rouge, Michigan, who wrote on behalf of unidentified clients. The Bower letter raised objections similar to EDS' and requested that the Region hold a public hearing on the draft permit. A.R. No. 15 (Letter from David A. Bower to Lisa Perenchio, Region V (Apr. 5, 2005)). The Region provided written responses to both letters in which it indicated the Region's intention to issue the draft permit in final form. *See* A.R. No. 15 (Letter from Lisa Perenchio, Region V, to William C. Fulkerson, EDS (May 10, 2005))("Region's Response to EDS' Comments"); A.R. No. 16 (Letter from Lisa Perenchio, Region V, to David A. Bower (May 12, 2005)). The Region, however, did not hold a public hearing during the comment period.

The Region issued a final UIC permit to SPMT on June 6, 2005, which it expected to become effective on July 6, 2005. *See* A.R. #18 (U.S. EPA, Underground Injection Control

Class III Permit (July 6, 2005)) ("Final Permit"). On July 6, 2005, EDS timely filed a petition for review listing the following objections to the Final Permit:

> (1) the Region's failure to provide for public comment at a public hearing is "arbitrary and capricious;"
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> (2) the well monitoring program in the Final Permit is inadequate;
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> (3) cavern monitoring was not included in the Final Permit; and
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> (4) the Final Permit failed to impose construction requirements for "packers" and "tubing" in order to prevent corrosion and escape of injection fluids.

Petition for Review ("Petition") at 1-3. In addition, the Petition requests that the Board provide relief to EDS by (1) setting aside the Final Permit and remanding it to the Region for further action, "specifically" including holding a public hearing to receive comments; and (2) modifying the Final Permit to include the specific requirements suggested by the Petition. *Id.* at 3.[10]

On September 15, 2005, the Region filed a response to the Petition. *See* U.S. EPA Region V, Response to Petition for Administrative Review ("Region's Response"). On the same day, SPMT, which the Board had previously granted leave to intervene, filed a response to EDS' Petition. *See* Response of [SPMT] to [EDS'] Petition for Review ("SPMT's Response").

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[10] We assume that EDS requests these two forms of relief in the alternative since the Board's modifying the Final Permit would make a remand unnecessary.

III. *DISCUSSION*

A. *Standard for Review*

The Board's jurisdiction to review UIC permit decisions is set forth in the 40 C.F.R. part 124 rules that govern this proceeding. The scope of Board review is a narrow one; the Part 124 rules provide that the Board will not grant review unless it appears from the petition that the permit condition in question is based on a "finding of fact or conclusion of law which is clearly erroneous," or involves an "exercise of discretion or an important policy consideration [that] the Board should review in its discretion." 40 C.F.R. § 124.19(a); 45 Fed. Reg. 33,290, 33,412 (May 19, 1980); *In re Envtl. Disposal Sys., Inc.,* ("*EDS*"), UIC Appeal Nos. 04-01 & 04-02, slip op. at 13-14 (EAB, Sept. 6, 2005), 12 E.A.D. _ (accord); *Puna Geothermal Venture*, 9 E.A.D. 243, 255-62, 263-65, 269-70, 272 (EAB 2000) (remanding portions of UIC permit pursuant to 40 C.F.R. §124.19(a)); *In re Jett Black, Inc.*, 8 E.A.D. 353, 367-73 (EAB 1999) (same), *appeal dismissed for lack of standing sub nom. Levine v. EPA*, No. 01-3072 (6th Cir. Feb. 18, 2003). The Board's analysis of UIC permits is guided by the preamble to the part 124 rules, which states that the Board's power of review "should be only sparingly exercised" and that "most permit conditions should be finally decided at the determined at the [permit issuer's] level." 45 Fed. Reg. at 33,412; *accord EDS,* slip op. at 13-14, 12 E.A.D. __; *In re Am. Soda, L.L.P.*, 9 E.A.D. 280, 286 (EAB 2000); *In re Envotech, L.P.*, 6 E.A.D. 260, 265 (EAB 1996).

The burden of demonstrating that review is warranted rests with the petitioner, who must state objections to the permit and explain why the permit issuer's response to those objections is clearly erroneous or otherwise warrants review. *See* 40 C.F.R. § 124.19(a); *see also, e.g., Puna Geothermal*, 9 E.A.D. at 246, 249-72; *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 567, 569-89 (EAB 1998), *review denied sub nom. Penn Fuel Gas, Inc. v. U.S. EPA*, 185 F.3d 862 (3d Cir. 1999). In this regard, a petitioner does not meet this burden merely by relying on its previous statements or objections, such as comments on a draft permit. Instead, the petitioner must "demonstrate why the Region's response to those objections (the Region's basis for its decision) is clearly erroneous or otherwise warrants review." *In re LCP Chems.-NY,* 4 E.A.D. 661, 664 (EAB 1993).

In addition, the Board generally "assigns a heavy burden to persons seeking review of issues that are quintessentially technical." *In re Ash Grove Cement Co.,* 7 E.A.D. 387, 403 (EAB 1997). This exacting standard of review arises from our long-established position that the Board should accord deference to permitting agencies with respect to technical issues. *See In re Steel Dynamics, Inc.,* 9 E.A.D. 165, 201 (EAB 2000); *accord Newmont Nev. Energy Inv., L.L.C.,* PSD Appeal No. 05-04, slip op. at 21 (EAB, Dec. 21, 2005), 12 E.A.D. __. Accordingly, because the instant case involves technical issues of what well testing and monitoring measures SPMT should implement to protect USDWs, EDS bears a heavy burden to show why the Board should not defer to the Region's determination on these technical matters.

Finally, as we stated in a recent decision, the "[EAB's] authority to review UIC permit decisions extends to the boundaries of the UIC permitting program itself, with its SDWA-directed focus on the protection of USDWs, and not farther." *EDS,* slip op. at 17, 12 E.A.D. ___; *see also In re MCN Oil & Gas Co.,* UIC Appeal No. 02-03, at 30 (EAB Sept. 4, 2002); *N.E. Hub*, 6 E.A.D. at 567; *In re Brine Disposal Well,* 4 E.A.D. 736, 742 (EAB 1993) (stating that "[i]t has therefore repeatedly been held that parties objecting to a federally issued UIC permit must base their objections on the criteria set forth in the Safe Drinking Water Act and its implementing regulations"). The Board's stress on its limited review powers respecting UIC permits is consistent with our observation that SDWA and the UIC regulations "establish the *only* criteria that EPA may use in deciding whether to grant or deny an application for a UIC permit, and in establishing the conditions under which deep well injection is authorized." *Envotech,* 6 E.A.D. at 264.

B. *Threshold Procedural Requirements*

Before a petitioner's arguments can be considered on their merits, all persons seeking Board review under the part 124 rules must meet certain preliminary thresholds conditions for Board review, such as timeliness, standing, preservation of issues for review, and specificity.[11] *See* 40 C.F.R. § 124.19(a) (describing threshold conditions for Board review); *In re B.P. Cherry*

[11] EDS has satisfied the thresholds of standing and timeliness by filing comments on the draft permit in this case and by filing its Petition within 30 days of the issuance of the Final Permit. *See* 40 C.F.R. § 124.19(a). Therefore, this Order will only consider as procedural issues whether the company has preserved for review the issues it raises on appeal and whether its appeal of the Final Permit is sufficiently specific.

Point, PSD Appeal No. 05-01, slip op. at 10-11 (EAB June 21, 2005), 12 E.A.D. ___ ; *see also In re Am. Soda, L.L.P.*, 9 E.A.D. 280, 286, 287-90 (EAB 2000).

Among other things, in order to demonstrate that an issue has been preserved for review, those seeking review of an EPA-issued permit must demonstrate "that any issues being raised were raised during the public comment period." 40 C.F.R. § 124.19(a); *see also* 40 C.F.R. § 124.13 (requiring that "[a]ll persons, including applicants, who believe any condition of a draft permit is inappropriate * * * must raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period * * * ."). Therefore, only those issues and arguments raised during the comment period can form the basis for an appeal to the Board, except to the extent that issues or arguments were not reasonably ascertainable at the time of the comment period. *See, e.g.*, *EDS*, slip op. at 53, 12 E.A.D. __; *MCN* at 13 (EAB, Sept. 5, 2002).

In addition, the Board has imposed as a threshold condition that those seeking review of final permits under part 124 further meet a minimum level of specificity in their petitions in order to justify Board review. Thus, the Board will not grant consideration on the merits of a permit challenge that is unacceptably vague. We have identified the source of this specificity condition in the language of 40 C.F.R. § 124.19(a), which requires a petitioner to include in a petition for review "a statement of the reasons supporting that review, including * * * a showing that the condition in question is based on" either a "clearly erroneous" finding of fact or conclusion of law or an "exercise of discretion or an important policy consideration" warranting review. 40 C.F.R. §

124.19(a)(1)-(2). The Board has interpreted this provision as requiring two essential components: (1) clear identification of the conditions in the permit at issue, and (2) argument that the conditions warrant review. *In re Federated Oil & Gas of Traverse City, MI,* 6 E.A.D. 722, 726 (EAB 1997) (quoting *In re Beckman Prod. Servs.,* 5 E.A.D. 10, 18 (EAB 1994)); *In re Envotech, L.P.,* 6 E.A.D. 260, 268 (EAB 1996) (same).

C. EDS' Appeal

1. *Failure to Provide for a Public Hearing*

EDS contends that the Region's decision not to hold a public hearing during the comment period was "arbitrary and capricious." Petition at 2. In support of this objection, EDS observes that Mr. Bower, the other participant in the comment period, had asked for a public hearing during the comment period. *Id.* EDS also remarks that "[a] public hearing would have provided an opportunity to address the public's concerns about the large scale storage for this dangerous material in the midst of an urbanized area." *Id.* at 2.

The regulations governing this proceeding provide that the Region "shall hold a public hearing whenever [it] finds, on the basis of requests, a significant degree of public interest in a draft permit." 40 C.F.R. § 124.12(a). As we have expressed on many occasions, the Region's decision to hold a public hearing is a largely discretionary one. *See, e.g., In re City of Fort Worth,*

6 E.A.D. 392, 407 (EAB 1996); *In re Avery Lake Prop. Owners Ass'n*, 4 E.A.D. 251, 252 (EAB 1992); *In re Osage (Pawhuska, Okla.)*, 4 E.A.D. 395, 399 (EAB 1992).[12]

In its response brief, the Region recounts that it received only two comment letters on the draft permit, one from EDS and the other from Mr. Bower, which in the Region's view did not evince sufficient public interest to justify a public hearing. Region's Response at 7. Furthermore, the Region notes that although EDS' Petition states that the prospect of storing LPG is one that warrants a public hearing due to the public's interest in LPG storage, EDS nowhere backs up this contention with supporting information such as the number of persons allegedly interested in the draft permit. *Id.*

Because a region's decision whether to hold a public hearing on a draft permit is largely a discretionary one, we determine that EDS has failed to demonstrate any clear error or abuse of discretion in the Region's decision not to hold a public hearing in this case. Here, in light of the minimal interest in the permit clearly indicated by the record and EDS' failure to otherwise substantiate a significant level of interest in the draft permit, the company has not met its burden of demonstrating that we should review the Final Permit on this ground.

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[12] Although EDS did not request a public hearing during the comment period, we are satisfied that this issue has been preserved for review since another commenter (Mr. Boyer) raised this issue during the public comment period. 40 C.F.R. § 124.19(a); *see In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 127 n.27 (EAB 1997) (stating that "[t]o preserve an issue for review, it is not necessary that *petitioners* have personally raised the issue, only that the issue have been raised by someone during the public comment period").

2. *Adequacy of the Well Monitoring Program*

EDS contends that the Final Permit's requirements for well monitoring are inadequate to protect the integrity of injection wells and prevent the migration of fluids. Petition at 2. In particular, EDS avers that the MI testing of injection wells prescribed in the Final Permit is "inadequate" to ensure that "[well] casing strings * * * are maintaining integrity to prevent migration of fluids."[13] *Id.* Also, EDS claims that instead of mandating inspections in the Final Permit itself, the Region simply relied on SPMT's "voluntary" commitment to conduct injection well inspections as part of the company's "10-year inspection cycle." *Id.* In this regard, EDS contends that it was "erroneous" to leave to the permittee's "discretion" carrying out specific inspections such as those for "[well] casing and tubing and repair and replacement or updating of wellhead equipment." *Id.*

In its April 6, 2005 comment letter ("EDS Comment Letter"), EDS expressed concerns about the age and integrity of the injection wells and the risk these conditions posed for migration of LPG, which, according to EDS, could contaminate a USDW or lead to LPG "escap[ing] to the surface where [gas] possibly could ignite or explode." EDS Comment Letter at 2. In particular, the company noted that the "wells to be used are nearly 50 years old" and were constructed before "UIC casing and sealing requirements were developed." *Id.* The company further expressed concern that the wells had been exposed to saturated brine "for decades," which in EDS' view could "cause corrosion" and "threaten the integrity of the wells." *Id.* at 2. In addition, the

[13] *See supra* note 7 for a definition of casing.

company noted that long-term use of the cave could lead to "spalling" of the cave that could damage the "cement sealing the casing string." *Id.* The company further inquired whether efforts would be made to "monitor strata above the injection zone to ensure that LPG has not migrated behind the casing cement upward." *Id.*

In its response to EDS' Comment Letter, the Region stated that the Final Permit required that each "well be tested for Part I and Part II of mechanical integrity [MI testing] prior to issuing the authorization to inject for each well." Region's Response to EDS' Comments at 2. The Region explained that Part I would involve "pressure testing of the casing and tubing by a standard annular pressure test or by the water-brine interface test" and that Part II testing "for integrity of the longstring cement could be done by an oxygen activation log, temperature log, or by a noise log."[14] *Id.* Furthermore, the Region stated that such Parts I and II testing would be "required initially and every five years thereafter." *Id.*

In its response to EDS' Comment Letter, the Region also explained that SPMT, as part of the company's "10-year inspection cycle" for "mechanical appurtenances" would, among other things, conduct the "inspection of casing and tubing, and repair, replace, or update wellhead equipment." *Id.* The Region further indicated that each "cavern wellhead has an emergency shut

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[14] MI testing requirements in the Final Permit provide that SPMT must "establish and * * * maintain mechanical integrity of this well in accordance with 40 C.F.R. § 146.8." *See* Final Permit pt. I.E.18. In addition, the Final Permit specifies that the permittee must meet Part I of MI testing by demonstrating "no significant leaks in the casing, tubing, or packer" and Part II by demonstrating "no significant fluid movement into an underground source of drinking water (USDW) through vertical channels adjacent to the wellbore." *Id.*

down valve that is set up to close the associated piping should any abnormal conditions occur in the cavern or associated piping," and that LPG "sensors" on the brine line would alarm the facility if they detected LPG in the atmosphere, triggering appropriate facility responses, including closure. *Id.*

In its Petition, EDS fails to explain how the Region's response to its comments, describing the Final Permit's requirements for MI testing, are inadequate to address the company's concerns about well integrity, monitoring, and the related issues of leaking and fluid migration. In our view, the pre-operation, MI testing required by the Final Permit is in fact directly germane to EDS' concerns on these topics. *See* Final Permit pt. I.E.18. For example, as the Region observes, Part I MI testing, which involves pressure testing, is designed to ensure that there is "no significant leak from the casing, tubing, or packer." Region's Response at 14 (citing 40 C.F.R. § 146.8(a)(1)). Part II testing is designed to assure that there is "no significant fluid movement into an underground source of drinking water through vertical channels adjacent to the injection well bore." *Id.* (citing 40 C.F.R. § 146.8(a)(2)). These MI testing procedures are directly related to well integrity, as well as preventing injected fluids from leaking from wells and moving into USDWs. As such, the Region's response addresses EDS' concerns about leaking and fluid migration.

Based on the foregoing, we believe that EDS has failed to meet its burden of showing *why* the Region's response to its comments regarding well integrity, monitoring, and the migration of injection fluids was "clearly erroneous" in accordance with our governing regulations. *See* 40 C.F.R. § 124.19(a); *see also In re LCP Chems.-NY,* 4 E.A.D. 661, 664 (EAB 1993) (holding that a

petitioner must demonstrate why the Region's response to the petitioner's objections is clearly erroneous or otherwise warrants review). As the Region observes in its brief, EDS' arguments that MI testing is inadequate or that additional permit requirements (such as SPMT's 10-year inspection plan) are necessary are merely conclusory. Region's Response at 9. We also agree with the Region's assertion that EDS' arguments are in fact so conclusory that they fall short of our threshold standard of specificity warranting Board review on the merits. *See In re Federated Oil & Gas of Traverse City, Mich.*, 6 E.A.D. 722, 726 (EAB 1997) (quoting *In re Beckman Prod. Servs.*, 5 E.A.D. 10, 18 (EAB 1994)); *In re Envotech, L.P.*, 6 E.A.D. 260, 267-69 (EAB 1996) (same).

In this case, EDS' failure to demonstrate clear error is magnified by the fact that, as the Region observes, the Final Permit simply carries out the specific monitoring prescribed by the UIC regulations for Class III wells. The Final Permit, as noted earlier, requires that SPMT carry out Part I and Part II MI testing pursuant to 40 C.F.R. § 146.8 prior to injection, and "thereafter once every sixty (60) months from the date of the last approved demonstration." *See* Final Permit pt. I.E.18. The UIC regulations, which establish "[o]perating, monitoring, and reporting requirements" for Class III wells, *see* 40 C.F.R. § 146.33, mandate, as one of several monitoring requirements, that Class III wells "demonstrat[e] mechanical integrity pursuant to § 146.08 at least once every five years during the life of the well for salt solution mining," *see id.* § 146.33(b)(3). Clearly, the Final Permit's monitoring requirements for Class III wells mirror the applicable UIC regulations.

The fact that the well monitoring conditions of the Final Permit adhere to the UIC regulatory requirements effectively negates EDS' permit challenge. As noted previously, SDWA and UIC regulations form the sole basis that EPA may use to decide whether to grant or deny an application for a UIC permit and to determine the conditions under which deep well injection will take place. *See , e.g., In re Envotech, L.P.,* 6 E.A.D. at 264. Accordingly, those challenging UIC permits must likewise do so on the basis of the SDWA and UIC regulations. *See, e.g., In re EDS Inc.,* UIC Appeal Nos. 04-01 & 04-02, slip op. at 17-22 (EAB Sept. 6, 2005), 12 E.A.D. __; *see also Envotech,* 6 E.A.D. at 264, 269-71. Here, where the monitoring requirements in the Final Permit conform to those prescribed by the UIC regulations,[15] and where EDS has not identified any provision of the SDWA or UIC regulations that otherwise supports its arguments, the company has failed to establish clear error in the Final Permit's well monitoring requirements.

In sum, for the reasons explained above, we deny review of the Final Permit on this basis.

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[15] We note that the Final Permit incorporates, in addition to MI testing, other UIC regulatory requirements for Class III well monitoring. *See* Final Permit at 14 (stating in the preface to Final Permit pt. III, titled "Special Conditions," that "special conditions include, but are not limited to, monitoring conditions * * * as required by 40 C.F.R. Parts 144 and 146"). The Final Permit's monitoring provisions, set forth in Final Permit part III.A (titled "Operating, Monitoring and Reporting Requirements"), incorporate the following UIC requirements: monitoring the nature of the injected fluids (40 C.F.R. § 146.33(b)(1)); monitoring injection pressure, flow rate, and fluid volumes (*see id.* § 146.33(b)(2)); and monitoring fluid level in the injection zone (*id.* § 146.33(b)(4)).

3. *Cavern Monitoring*

EDS contends that the Region committed clear error because the Final Permit "failed to include requirements for [cavern] monitoring to ensure the integrity of the storage caverns." Petition at 2. Similar to its objections concerning well monitoring, EDS faults the Region for "rel[ying] upon SPMT to perform its own inspections and verify the integrity of the cavern." *Id.* The company opines that "the requirements set forth in the regulations were not intended to be adequate for every project" and that "[i]n this case, cavern roof monitoring in the vicinity of the wells and at least annual mechanical integrity testing should be required." *Id.*

In its comment letter, EDS had raised concerns about ensuring the integrity of caverns, stressing the risk that LPG could migrate out of the injection zone to contaminate a USDW or escape to the surface where it could cause an explosion. EDS Comment Letter at 1. The company also remarked that "historic, long-term use of the caverns could lead to spalling of the cavern roof," which could cause the cavern to "cav[e] in some places." *Id.* at 2. Claiming that such caving, if it occurred near the well casing, could "threaten the integrity of the cement sealing the casing string," the company inquired what measures had been taken "to ensure the integrity of the cavern ceiling[.]" *Id.*

In its response letter, the Region responded to EDS' concerns by stating that SPMT's "10-year inspection cycle" discussed above included "sonar[ing]" caverns and that "during freshwater injection or cavern expansion," the company would sonar at "shorter intervals to accurately

determine cavern expansion rates." Region's Response to EDS' Comments at 2. The Region also noted that prior to authorization to inject and afterwards every five years, the injection wells would be subject to Parts I and II MI testing. *Id.* Furthermore, the Region stated that each cavern wellhead is fitted with "an emergency shutdown valve that is set up to close the associated piping should any abnormal conditions occur in the cavern or associated piping." *Id.*[16]

In its Petition, EDS does not identify any UIC requirement regarding cavern monitoring with which the Final Permit does not comply. As we noted, the UIC regulations form the only criteria by which the EPA is authorized to grant or deny an application for a UIC permit or to establish conditions in a UIC permit. *See e.g., In re Envotech, L.P.,* 6 E.A.D. 260, 264, 269-271 (EAB 1996). As SPMT and the Region argue in their response briefs, the Final Permit simply

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[16] In its response brief, SPMT contends that EDS failed to preserve for review its arguments on appeal that the Final Permit's well monitoring program is inadequate and that the Final Permit does not include requirements for cavern monitoring. *See* SPMT's Response at 6; *see also supra* Part III.B. (discussion on preserving issues for review). We will not address SPMT's contention in detail in our order because EDS' arguments fail to establish grounds for review based on their own merits and lack of specificity, as discussed here. SPMT's contention, however, has substantial merit, and EDS' failure to raise these arguments squarely during the comment period constitute additional grounds for denying review on these two issues. We note that EDS' comment letter only referred to the issue of "monitoring" glancingly, inquiring "what efforts will be made to monitor strata above the injection zone to ensure that LPG has not migrated behind the casing cement upward?" EDS Comment Letter at 2. Nowhere does the comment letter refer to an allegedly inadequate well monitoring program or identify alleged omissions in necessary cavern monitoring, as does EDS' appeal. EDS' "monitoring" inquiry, above, as well as the company's remarks on the dangers posed by the injection wells' advanced age, brine corrosion, and failures in cavern integrity, *see* EDS Comment Letter, simply do not raise its arguments on appeal with sufficient specificity to have preserved them for review in accordance with our jurisprudence in this area. *See infra.* Moreover, EDS could not claim that these arguments were not "reasonably ascertainable" during the comment period and thus excuse its failure to raise them below. *See supra* Part III.B. The draft permit was available to EDS during the comment period and, therefore, nothing would have prevented EDS from commenting upon the lack of adequate injection well and cavern monitoring requirements at this time.

implements the UIC regulations designed to protect cavern integrity. SPMT's Response at 9; Region's Response at 12-13. In this respect, SPMT notes that the Final Permit provides a "maximum injection pressure * * * 'set to prevent injection formation fracturing,'" as well as "establishes an injection procedure that requires constant monitoring of cavern characteristics, including pressure to 'facilitate safe cavern operations.'" *Id.* (citing Final Permit pts. III.A-1, III.D-3; 40 C.F.R. § 146.33(a)).

A reading of the UIC regulations supports SPMT's and the Region's arguments. In particular, the UIC regulations for Class III wells require the following:

> Except during well stimulation[,] injection pressure at the wellhead shall be calculated so as to assure that the pressure in the injection zone during injection does not initiate new fractures or propagate existing fractures in the injection zone. In no case[] shall injection pressure initiate fractures in the confining zone or cause the migration of injection or formation fluids into an underground source of drinking water.

40 C.F.R. § 146.33(a)(1). We note that the UIC regulations define "injection zone" as a "geological 'formation,' group of formations, or part of a formation receiving fluids through a well." 40 C.F.R. § 146.3. In this respect, the Fact Sheet accompanying public notice of the Final Permit specifies that "injection of fluids for solution mining of salt is limited by the permit to the F, E, D, C and B units of the Salina Group in the interval between 1150 and 1800 feet below

ground surface." Fact Sheet at 2; *see also* Final Permit at 1. Undoubtedly, the caverns, which will receive the injected fluids, constitute this bounded "injection zone," and as such, the caverns are subject to the UIC monitoring and operating requirements designed to protect against the risk of formation fracturing and potential contamination of the USDWs. *See* 40 C.F.R. § 146.33(a)(1). Part III of the Final Permit, as both the Region and SPMT note, *see* SPMT's Response at 9; Region's Response at 14, simply implements the UIC regulatory requirements by requiring cavern monitoring during fluid injection in order to protect the integrity of the injection zone.[17] Consequently, EDS has failed to raise any argument for Board review of the Final Permit on this ground. *See Envotech,* 6 E.A.D. at 264, 269-71.

Although we reject EDS' argument that the Final Permit lacks monitoring requirements for cavern integrity, we nonetheless remand the Final Permit so that the Region may make a minor change to the language regarding cavern monitoring in the interest of clarity. In particular, the Final Permit appears ambiguous on whether cavern monitoring *is* required in all situations. As noted before, *see supra* notes 15 and 17, the preface to Part III of the Final Permit ("Special

[17] Part III of the Final Permit, entitled "Special Conditions" states in its preface that "special conditions include, but are not limited to, plans for maintaining correct operating procedures, monitoring conditions and reporting, as required by 40 C.F.R. [p]arts 144 and 146." Final Permit at 14. The preface further provides that these "[t]hese plans are described in detail in the permittee's application for a permit, and the permittee is required to adhere to these plans as approved by the Director * * * ." Part III.D of the Final Permit, incorporating a section from SPMT's permit application, *see* Permit Application pt. K ("Summary: Injection Procedure"), states that "[c]avern characteristics including pressure shall be monitored at all times and fluid movement controlled to facilitate safe cavern operations. Brine concentrations and scheduled sonar tests will determine the actual cavern growth rate and volume." Final Permit pt. III.D-3. The Final Permit also establishes a maximum injection pressure designed to prevent "injection formation fracturing" in conformity with 40 C.F.R. § 146.33(a)(1). Final Permit pt. III.A-1.

Conditions") states that "[SPMT] is *required* to adhere to [monitoring conditions] as approved by the Director." However, subpart D, which incorporates injection procedures – including cavern monitoring conditions – from SPMT's permit application, *see id.*, is subtitled "Additional Requirements (*If Required*)," Final Permit at 14 (emphasis added). The "If Required" language can be read to suggest that cavern monitoring described in the Final Permit part III.D-3 may not be required in certain situations or is subject to a determination of necessity by the Agency, which is contrary to the UIC regulations and the text of the Final Permit.

For this reason, we remand the Final Permit to the Region in order that the Region may revise the Final Permit so that the Final Permit indicates clearly that cavern monitoring is *always* required during fluid injection in accordance with 40 C.F.R. § 146.33(a)(1).

4. *Failure to Impose Construction Requirements*

EDS contends that the Region clearly erred by not including in the Final Permit "specific well-construction requirements for equipment such as packers and tubing." Petition at 3. In support of this argument, the company states that specifying such requirements is "an industry [-] recognized method of addressing potential corrosion issues." *Id.* EDS elaborates that the Final Permit lacks requirements for "construction or materials to be used for down hole equipment," fails to "assure that the proper well construction will be employed or that it will be maintained," and does not address "critical well components to prevent escape of fluids and control corrosion." *Id.*

In addition, EDS faults the Final Permit for leaving the decision on which well equipment is covered to the operator's discretion. *Id.*

In its response to the Petition, the Region states that EDS failed to raise below the issue of inadequate construction requirements for wellhead equipment, instead only raising general concerns about corrosion in its comment letter. Region's Response at 15. As such, claims the Region, EDS failed to preserve the issue of construction requirements for review in accordance with the 40 C.F.R. part 124 rules because the company did not demonstrate "that any issues being raised [regarding construction requirements] were raised during the public comment period." *Id.* (citing 40 C.F.R. § 124.19(a)). Alternatively, the Region argues that even if EDS had preserved the issue of well construction for review, the Region has already adequately addressed it in the Final Permit. In this respect, the Region notes that based on "[the Region's] knowledge of the well construction and the reassurance of well integrity provided by the MI requirements referenced above, the Region concluded that corrosion of the well casing is not of concern and further specification of construction materials is not necessary to address concerns over corrosion." *Id.* at 16. SPMT, in its response to the Petition, similarly points out that permit conditions specifying construction materials are not necessary because MI testing already requires a "demonstration that no significant leaks in the casing, tubing or packer of a well exists," which would be adequate to detect corrosion. SPMT Response at 9.

We agree with the Region that EDS failed to preserve for review the issue of construction requirements as mandated by the part 124 procedures. *See* 40 C.F.R. § 124.19(a). Nowhere in its

comment letter does EDS contend that the Region should have specified requirements for well construction and well materials in the Final Permit in order to prevent corrosion and leakage. *See* EDS Comment Letter at 2. Rather, in its comment letter, EDS only addressed issues of age and potential deterioration of the well equipment. It stated that, "[b]ased upon the information available to us[,] we understand the wells to be used are nearly 50 years old and constructed well before modern completion techniques were employed and the UIC casing and sealing requirements were developed." *Id.* In this vein, the company also commented that the "wells have been exposed to saturated brine for decades which could cause corrosion and threaten the integrity of the wells." *Id.*

In examining whether a petitioner has preserved an issue for review, we have emphasized that the issue to be reviewed must have been "specifically" raised during the comment period. *In re MCN Oil and Gas Co.* ("*MCN*"), UIC Appeal No. 02-03, slip op. at 13 (EAB, Sept. 5, 2002), *In re New England Plating Co.*, 9 E.A.D. 726, 732-35 (EAB 2001); *In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 230-31 (EAB 2000). As we have explained in these decisions, imposing this specificity requirement serves the useful purpose of ensuring the Region has an opportunity to address potential problems with a draft permit before the permit becomes final, thereby promoting the Agency's longstanding policy that most permit issues should be resolved at the Regional level, and providing predictability and finality to the permitting process. *See, e.g., In re EDS, Inc.*, UIC Appeals Nos. 04-01 & 04-02, slip op. at 53 (EAB Sept. 6, 2005), 12 E.A.D. __; *MCN* at 14; *New England Plating,* 9 E.A.D. at 732; *Steel Dynamics,* 9 E.A.D. at 229-30.

EDS' prior comments – that the wells' advanced age render them vulnerable to corrosion and leakage – are simply too distinct from its arguments now raised on appeal – that the Final Permit must include specific well construction and material requirements – to have preserved the company's arguments for review. In other words, EDS' letter comments are too tangential from its appeal argument to have meaningfully alerted the Region during the comment period that it should address below the topic of materials and well construction requirements. Thus, granting review to EDS' arguments on this basis would frustrate the Agency's goal of having permit issues resolved at the regional level, thus encouraging predictability and efficiency in the permitting process.

In addition, there is nothing that indicates that the issue of requiring construction and material requirements for wells was not "reasonably ascertainable" during the comment period. *See* 40 C.F.R. §§ 124.13, 124.19(a). The draft permit was available to EDS during the public comment period and, as such, nothing would have precluded EDS from noting and commenting upon the lack of construction and material well requirements therein. For these reasons, we find that EDS failed to preserve for review its arguments on the need for construction and materials requirements in the Final Permit.[18]

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[18] Even if we were to address EDS' arguments regarding construction requirements on the merits, we agree with the Region and SPMT and nevertheless would have denied review of this issue. As described earlier, the Region in its response to EDS' comment letter explained that the pre-operation MI testing requirements in the Final Permit would impose upon SPMT the obligation to safeguard against the risk of leakage and migration of injection fluids from the wells. *See* Region's Response to EDS Comments at 2. EDS, which advocates materials and construction requirements as a means to control migration and leakage, completely fails to address why MI testing would not be sufficient to control these risks. Therefore, the company's arguments would not justify Board review. *See In re LCP Chems.-NY,* 4 E.A.D. 661, 664, 668-69 (EAB 1993) (in order to justify Board review, a petitioner must demonstrate why the region's response to comments is clearly erroneous or otherwise warrants review). Moreover, EDS does

IV. *CONCLUSION*

For the reasons described above, the Board denies review on all issues raised by EDS. However, the Final Permit is remanded for the limited purpose of clarifying SPMT's obligations to conduct cavern monitoring during fluid injection consistent with this order.[19]

So ordered.[20]

ENVIRONMENTAL APPEALS BOARD

Dated: June 1, 2006

By: Kathie A. Stein
Kathie A. Stein
Environmental Appeals Judge

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not identify any SDWA provision or UIC regulation in support of its arguments in this regard. As we have repeatedly emphasized, the Board is authorized to review UIC permitting decisions only as they affect a well's compliance with the SDWA and applicable regulations. *See MCN* at 4-6.

[19] An appeal of the remand decision to the Board will not be necessary to exhaust administrative remedies under 40 C.F.R. § 124.19(f)(1)(iii).

[20] The panel deciding this matter is comprised of Environmental Appeals Judges Edward E. Reich, Kathie A. Stein, and Anna L. Wolgast.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying Review in Part and Remanding in Part in the matter of Sunoco Partners Marketing & Terminals, LP, UIC Appeal No. 05-01, were sent to the following persons in the manner indicated:

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