STATEMENT REGARDING ORAL ARGUMENT

Respondent EPA respectfully requests oral argument.

STATEMENT OF JURISDICTION

This Court lacks jurisdiction, because the petitioner has neither Article III nor prudential standing to maintain this action.

STATEMENT OF THE ISSUES

1. Whether Petitioner has standing to contest the terms of Underground Injection Control permits, when those permits were issued to a third party that is not contesting their terms.
2. Whether EPA reasonably declined to approve the use of annulus gel as an additive and reasonably required that the wells be operated with a closed annulus.
3. Whether there is an underground source of drinking water near the wells at issue or whether EPA has the authority to impose permit conditions on underground injection wells regardless of the existence of an underground source of drinking water in the vicinity of the well.

STATEMENT OF THE CASE

A. Nature of the Case

Congress enacted the Safe Drinking Water Act ("SDWA") in 1974 to ensure that the Nation's sources of drinking water are protected against contamination and "to prevent underground injection which endangers drinking water sources." 42 U.S.C. § 300h(b). Among other things, the Act directed EPA to promulgate permit regulations containing minimum requirements for underground injection control ("UIC") programs. 42 U.S.C. § 300(h).

This case involves Petitioner Syd Levine's ("Mr. Levine") challenges to the permit conditions imposed on a third party, Jett Black, Inc. ("Jett Black"), in two underground injection control permits issued by EPA Region 4 on December 12, 2000.

The permit terms that Mr. Levine challenges are designed to ensure the mechanical integrity of the wells at issue and to ensure that any leaks that do occur in those wells are caught and fixed quickly, before contaminants from those wells reach underground sources of drinking water. Mr. Levine's petition, if granted, would seriously undermine this statutorily-mandated effort.

Jett Black, the permit holder, does not challenge the permits or their conditions. Mr. Levine, who is neither the permit holder nor a representative of Jett Black, seeks review of two technical requirements of the permits and challenges EPA's authority to impose permit conditions on injection wells that he maintains are located in an area where there is no underground source of drinking water ("USDW").

As set forth in EPA's earlier-filed Motion to Dismiss, Mr. Levine lacks standing to challenge the conditions in those permits. The holder of those permits, Jett Black, was perfectly capable of doing so itself, but chose not to. Further, as set forth below, EPA's decision on the technical requirements contained in the permits and its authority to regulate injection wells regardless of the existence of a USDW, must be upheld, and Mr. Levine's petition for review must be denied.

B. Statutory Background

Enacted in 1974, the SDWA responded to "accumulating evidence that our drinking water contains unsafe levels of a large variety of contaminants." Environmental Defense Fund v. Costle, 578 F.2d 337, 339 (D.C. Cir. 1978). See Pub. L. No. 93-523, 88 Stat. 1661 (1974). The SDWA is designed to ensure

"that water supply systems serving the public meet minimum national standards for protection of public health." H.R. Rep. No. 93-1185, at 1 (1974), reprinted in 1974 U.S.C.C.A.N. 6454.

Part C of the SDWA, 42 U.S.C. §§ 300h to 300h-8, is designed to protect underground sources of drinking water from contamination caused by underground injection of fluids.[1/] The Act required EPA to promulgate regulations that set forth minimum requirements for State UIC programs. See 42 U.S.C. §§ 300h(b)(1). In those States, like Kentucky, where EPA has not approved a State UIC program, EPA directly implements its own UIC regulations. See generally Philips Petroleum Co. v. EPA, 803 F.2d 545, 548 (10th Cir. 1986).

Section 1421(b)(1) of the SDWA provides that regulations for UIC programs "shall contain minimum requirements for effective programs to prevent underground injection which endangers drinking water sources within the meaning of subsection (d)(2) of this section." 42 U.S.C. § 300h(b)(1). Subsection (d)(2), known as the "endangerment standard," states that

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[1/] An "underground source of drinking water" is an aquifer capable of yielding drinking water sufficient to supply a public water system containing less than 10,000 milligrams per liter of total dissolved solids. 40 C.F.R. § 144.3. An aquifer is a geological formation yielding water to a well or spring. Id.

> [u]nderground injection endangers drinking water sources if such injection may result in the presence in underground water which supplies or can reasonably be expected to supply any public water system of any contaminant, and if the presence of such contaminant may result in such system's not complying with any national primary drinking water regulation or may otherwise adversely affect the health of persons.

Id. § 300h(d)(2).

The SDWA also states that EPA

> may not prescribe requirements which interfere with or impede--(A) the underground injection of brine or other fluids which are brought to the surface in connection with oil or natural gas production or natural gas storage operations, or (B) any underground injection for the secondary or tertiary recovery of oil or natural gas, *unless such requirements are essential to assure that underground sources of drinking water will not be endangered by such injection.*

42 U.S.C. § 300h(b)(2) (emphasis added).

C. Regulatory Background

EPA's regulations implementing Part C of the SDWA are contained in 40 C.F.R. Parts 144-148. Part 144 establishes the regulatory framework, including permitting requirements, for EPA-administered UIC programs. Part 146 sets out technical criteria and standards that must be met in permits and authorizations by rule as required by Part 144. Certain procedural requirements applicable to UIC permits are also found in 40 C.F.R. Part 124. In states like Kentucky, the

regulations set forth in Parts 144, 146, and 124, as well as Kentucky-specific requirements found at 40 C.F.R. § 147.900-905, become the federally implemented program.

A classification system for underground injection wells was established in the original promulgation of UIC regulations in 1979. Injection wells are classified as Class I, II, III, IV, or V. See 40 C.F.R. §§ 144.6, 146.5. Class II wells, like those at issue in this case, are defined as

> [w]ells which inject fluids: (1) Which are brought to the surface in connection with natural gas storage operations, or conventional oil or natural gas production and may be commingled with waste waters from gas plants which are an integral part of production operations, unless those waters are classified as a hazardous waste at the time of injection; (2) *For enhanced recovery of oil or natural gas*; and (3) For storage of hydrocarbons which are liquid at standard temperature and pressure.

40 C.F.R. § 144.6(b) (emphasis added).

The fundamental requirement of EPA's SDWA regulations implementing the "endangerment standard" provides that

> [n]o owner or operator shall construct, operate, maintain, convert, plug, abandon, or conduct any other injection activity in a manner that allows the movement of fluid containing any contaminant into underground sources of drinking water, if the presence of that

> contaminant may cause a violation of any primary drinking water regulation under 40 CFR Part 142 or may otherwise adversely affect the health of persons.

40 C.F.R. § 144.12(a).

D. Statement of Facts

1. General Background

Jett Black owns certain oil and gas leases, including what is referred to as the Randolph-Boling Lease and the Boling-Richards Unit Lease, located in the Easton Consolidated Oil Field in Hancock County, Kentucky. (R. 16, 43) Jett Black is incorporated in Indiana, and is authorized to do business in Kentucky. EPA's Mot. to Dismiss, Ex. A, B. Mr. Levine is not listed as having any role in the company in the Indiana Secretary of State record, and the Kentucky Secretary of State record lists Mr. Levine only as the corporation's agent. Id.

Pursuant to the SDWA, two UIC permits were issued by EPA Region 4 to Jett Black authorizing, with certain restrictions, the injection of fluids into existing Class II wells on these leases for the enhanced recovery of oil and natural gas. (R. 94, 95) Mr. Levine challenges these restrictions on Jett Black's injection activities and the permits in which they are contained.

2. Relevant Technical Requirements

Standard Class II injection wells are constructed with an outer string of casing and an internal string of injection tubing. The outer casing and the internal injection tubing are separated by a space called an annulus. This space is closed at the bottom by the packer and at the top by the well head. The annulus is filled with fluid,[2/] which is maintained at a certain pressure. (R. 101 at 14 EPA response to EAB petition, Apx. pg.___) Monitoring annulus pressure is a standard industry method used to detect a loss of mechanical integrity, i.e., a leak in the casing, tubing or packer. Id. See also 40 C.F.R. § 146.8(a)(1). Leaks in the casing, tubing or packer will normally result in a change in annulus pressure, if the annulus is closed. If the annulus is not closed, however, there will be no way of knowing of a change in pressure and hence no detection of a loss of mechanical integrity. (R. 101 at 14 EPA response to EAB petition, Apx. pg.___)

EPA requires that the fluid placed in the annulus (referred to below as the "annular additive") be approved by EPA. In 1998, the National UIC Technical Workgroup ("UIC workgroup") developed a recommended procedure whereby

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[2/]Fluids, such as fresh water and brine, are placed in the annulus to offset pressure that is found in the injection zone. (R. 101 at 13 EPA response to EAB petition, Apx. pg.___)

such approval can be sought. (R. 96 UIC workgroup report, Apx. pg.__) The UIC workgroup's recommendation explains EPA's concern about the use of annular additives to address leaks in injection wells. chief concern is whether such additives give rise to long-lasting or only temporary results. Id. Therefore, the UIC workgroup recommended that each proposed additive be tested to demonstrate its effectiveness and be "marketed by its manufacturer for the purpose of stopping leaks in the long term" before being approved for use in the annulus. Id. In their comments on the draft permits, Jett Black and Levine requested that Jett Black be allowed to use an unapproved gel as an annular additive. (R. 4 at 4-5)

This "gel," a bentonite powder with clay-sized particles, increases the viscosity of the water in the annulus and may temporarily plug small leaks and holes. Notably, however, it has not been marketed for use as an annular additive to inhibit corrosion or to plug small leaks and holes in casing or other tubular goods. (R. 122)

EPA has determined that an aquifer that has a flow rate over one gallon per minute has enough yield to meet the definition of an underground source of drinking water. (R. 63) In August 1997, George Ford, an EPA enforcement

officer, conducted a series of aquifer tests in the Easton Consolidated Oil Field (where Jett Black's wells are located (see, R. 16, 43) and determined that an aquifer in the area, known as the Caseyville-Tradewater Formation, fell within the definition of a USDW. (R. 72 George Ford letter, Apx. pg.___; R. 16 Ex. E; R. 43 Ex. E) Specifically, Mr. Ford confirmed the existence of an aquifer with an average flow rate in excess of one gallon per minute. (R. 72 George Ford letter, Apx. pg.___)

3. Permit Proceedings

The permitting process at issue here began in 1988 when Panther Creek, a predecessor to Jett Black, informed EPA that Panther Creek was operating approximately seven Class II injection wells in violation of applicable UIC regulations, including UIC inventory requirements. (R. 45) EPA and Panther Creek subsequently entered into an Administrative Order on Consent ("AOC") that required Panther Creek to submit a permit application by June 30, 1989, for any injection wells it planned to operate. (R. 45) As required by the AOC, on June 30, 1989, the successor to Panther Creek, Kenneth R. Ingle Associates, Inc. (now known as Jett Black, Inc.), submitted UIC permit applications to EPA for

both the Randolph-Boling Lease (R. 16), and the Boling-Richards Unit Lease. (R. 43)

On December 16 and 30, 1997, EPA issued draft permits and a statement of basis summarizing its reasons for proposing to issue the permits. (R. 7, 9, 20, 22) EPA also issued a public notice for the proposed issuance of both permits and requested public comment. (R. 8, 21) The draft permits contained certain conditions including the requirement that any additive placed in the annulus be an approved additive and that the annulus be closed. (R. 7, 20)

On February 27, 1998, Jett Black, Mr. Levine, and Syd Levine & Associates ("Jett Black and Levine"), submitted lengthy combined written comments on the draft permits. (R. 4) At that time, Syd Levine & Associates was a consultant to Jett Black. (R. 114 EAB Order at 3, Apx. pg.___) The comments addressed twenty-five subjects including a request that "fresh water and gel be added to the list of permissible annular fluids." (R. 4 at 5) Jett Black and Levine also requested that Jett Black be allowed to operate the wells with an open, as opposed to closed, annulus, maintaining that because the wells at issue are shallow, "neither a closed annulus nor monitoring of annulus pressure" should be required. (R. 4 at 5) In addition, Jett Black and Levine stated that no

USDWs exist in the area of Jett Black's wells. Accordingly, they requested an easing of the regulations pursuant to 40 C.F.R. § 144.16 (which gives EPA the discretionary authority to waive certain regulatory requirements in limited cases). Jett Black and Levine further requested that mechanical integrity requirements, designed to ensure the well's structural integrity and prevent leaks, be lessened and that no additional mechanical integrity tests be required. (R. 4 at 2)

On March 16, 1998, Region 4 issued a combined response to those comments (R. 3) and simultaneously issued the UIC permits. (R. 1, 18) The permits retained the language requiring that the wells be operated with a closed annulus and that the annulus be monitored for pressure so as to detect any leaks. EPA further denied the request to add gel to the list of approved annular additives and retained the language in the permits requiring that additives to the annulus have EPA approval. Id. Because EPA determined that a USDW *did* exist in the area of Jett Black's wells (see R. 72 George Ford letter, Apx. pg.__), EPA did not reach the issue of whether to ease SDWA regulatory requirements pursuant to 40 C.F.R. § 144.16.

4. **Petition to the EAB**

In accordance with EPA's appeal procedures (R. 3), on April 21, 1998, Jett Black and Levine appealed to the Environmental Appeals Board ("EAB") for review of certain provisions of both UIC permits, including those provisions concerning the type of annular additive allowed and the requirement for a closed annulus. (R. 97, 98) Jett Black and Levine also repeated their earlier assertion that no USDW exists in the area of Jett Black's wells and that regulatory relief should therefore be granted pursuant to 40 C.F.R. § 144.16.

EPA submitted a combined response to the petitions on August 17, 1998. (R. 101 EPA Response to EAB petition, Apx. pg.___) Jett Black and Levine submitted a reply to EPA's Response on October 2, 1998. (R. 102) On May 29, 1999, the EAB issued an Order denying review in part and remanding in part. (R. 114 EAB Order, Apx. pg.___) Of the twenty-one issues raised by Jett Black and Levine, the EAB remanded seven and directed EPA Region 4 to either revise the language in the permits or provide a more reasoned response. (R. 114 EAB Order, Apx. pg.__)

Specifically, as pertains to the instant petition, the EAB remanded the issue as to the proposed use of gel as an additive and whether a closed annulus should

be required. (R.114 at 19-21 EAB Order, Apx. pg.___) Additionally, the EAB found that EPA had the authority to issue permit requirements to Jett Black "even if it were true that injection wells do not endanger any USDWs" and that relief under 40 C.F.R. § 144.16 was purely discretionary. (R. 114 at 12-13 EAB Order, Apx. pg.___) Finding that the Region's decision not to impose less stringent requirements was not clearly erroneous, the EAB denied review on that issue. Id.

5. EPA's Response to the EAB Partial Remand

By letter dated December 1, 2000, the Region responded to each of the seven issues remanded by the EAB. (R. 115 EPA response to EAB partial remand, Apx. pg.___). Two of those issues, the denial of the use of the proposed gel as an annular additive and the requirement for a closed annulus, are the subject of this petition for review.

a. The Proposed Gel

Jett Black and Levine had argued to the EAB that their proposed gel was an appropriate annular additive and that it had been previously approved by EPA Region 4. In its response, EPA did not address the assertion that it had previously approved the use of the gel but maintained that the gel was rejected

because it "will not inhibit corrosion in the annular area and is not designed and marketed as an annular additive." (R. 101 at 13 EPA response to EAB petition, Apx. pg.__) The EAB had found EPA's explanation for rejecting use of the gel to be inadequate and ordered Region 4 to either approve the use of the proposed gel or provide a more complete explanation for rejecting the request to add it to the list of approved annular additives. The EAB also ordered the Region to respond to the allegation that it had previously approved the use of this gel as an annular additive. (R. 114 at 19-20 EAB Order, Apx. pg.___)

In response to the EAB's partial remand, EPA expanded on its concern that the proposed gel does not inhibit corrosion. EPA further explained that the proposed gel is an undesirable additive because its use may lead to the false conclusion, on the basis of periodic tests, that there are no leaks, when in fact there are. Operators are typically required to perform an EPA-approved test once every five years to demonstrate a well's mechanical integrity. 40 C.F.R. § 146.23(b)(3). If the proposed gel, with its clay-sized particles, was added to the annulus before the test, it could plug small holes in the tubing and casing. The proposed gel, however, has not been tested to demonstrate that its effectiveness as a plug is anything more than temporary. Thus, testing the well

while these holes are temporarily plugged by the gel could result in the erroneous conclusion that there are no leaks, allowing the well to falsely demonstrate mechanical integrity. (R. 115 at 1, 2 EPA response to EAB partial remand, Apx. pg.___) When the plug became displaced from the holes, leaking would resume and could go undetected. Id.

EPA also responded to the allegation that Region 4 had previously approved the use of this gel, concluding that it could find no evidence that the proposed gel had previously been approved by Region 4 as an annular additive. Id.

b. Closed Annulus

Jett Black and Levine had also argued to the EAB that the UIC regulations did not authorize EPA to require either a closed annulus or monitoring of the pressure in the annulus. In its remand, the EAB found that the regulations provided EPA with the authority to require annulus monitoring. (R. 114 at 20-21 EAB Order, Apx. pg.___) The EAB found, however, that EPA had not adequately responded to the assertions concerning an open annulus. Id. The EAB ordered EPA Region 4 to "provide a reasoned response" or revise the permits. Id.

In response to the remand, EPA expanded on its reasoning as to why a closed annulus is necessary even in a shallow injection well. (R. 115 at 2-3 EPA response to EAB partial remand, Apx. pg.___) EPA explained that although some leaks may be detected visually, leaks of injection fluid from the tubing would not necessarily rise to the surface and be visible in an open annulus. Id. For example, the fluid could leak through the outer casing instead of traveling up the annulus to the surface and thus never be detected. Id. If the annulus is closed and monitored, however, the change in pressure is more than likely to alert the owner or operator to all leaks. Id. Therefore, the permits require that the annulus be closed and monitored for pressure changes.

6. The Issuance of the Permits and the Instant Petition

On December 12, 2000, EPA Region 4 issued two final UIC permits to Jett Black. (R. 94 Permit KYA0361, Apx. pg.___; R. 95 Permit KYA0362, Apx. pg. __) Permit requirement for a closed annulus, the obligation to monitor annulus pressure, and the requirement that any fluid added to the annulus be an EPA-approved annular additive. Id. The proposed gel was not added to the approved list of annular additives. (R. 115 at 2 EPA response to EAB partial remand, Apx. pg.___)

In a subsequent petition for administrative review dated January 15, 2001, Jett Black and Levine requested that the EAB review two of the seven issues addressed by the Region its response to the partial remand. (R. 116 Second Pet. for Review, Apx. pg.___) Specifically, Jett Black and Levine requested additional review of the Region's decision not to allow the use of their proposed gel as an additive in the annulus and the decision to require a closed annulus. Id.

On January 19, 2001, the EAB issued an Order dismissing the January 15, 2001, petition, concluding that "the Region's determination on remand constitutes final agency action" and that no further review by the EAB was warranted. (Apx. pg.___)

On January 24, 2001, Mr. Levine alone timely filed with this Court a petition for review.

SUMMARY OF ARGUMENT

Mr. Levine makes three claims: (1) that EPA should have allowed Jett Black to use the proposed gel as an annular additive; (2) that EPA should have allowed the Jett Black wells to operate with an open, instead of a closed, annulus; and (3) that there is no USDW in the area of Jett Black's wells and thus EPA has

no authority to regulate the wells or should waive some or all of the permit requirements.

Mr. Levine's petition for review should be dismissed or denied. Mr. Levine's petition should be dismissed because Mr. Levine, who is not the permittee, has no standing before this Court to challenge the stringency of the conditions of a permit issued to a third party. Mr. Levine's argument that he has standing due to his concern over the potential effect of the permit conditions on his well water supply, is belied by his argument that there is no underground source of drinking water in the vicinity and the fact that he does not seek to *replace* the offending permit conditions but merely give Jett Black more options for compliance under the permit.

Even if Mr. Levine has standing, the Court should uphold the technical conditions EPA has imposed in the two UIC permits because those conditions are reasonable and were amply supported by record evidence. Mr. Levine also is wrong in his allegation that there is no USDW in the area of Jett Black's wells and his argument that EPA lacks statutory authority to regulate underground injection wells in the absence of a USDW. EPA's decision to require permits on

the facts developed below was neither arbitrary, capricious or contrary to law. Thus, on the merits, the petition must be denied.

STANDARD OF REVIEW

Under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A), the applicable standard of review is whether EPA's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." This is a deferential standard that presumes the validity of agency actions. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971); Michigan v. Thomas, 805 F.2d 176,181-82 (6th Cir. 1986).

This standard of review "is a narrow one" under which the court is not "to substitute its judgment for that of the Agency." Citizens to Preserve Overton Park, 401 U.S. at 416. In determining whether the agency's actions violated the APA standard "the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Northern Ohio Lung Ass'n v. EPA, 572 F.2d 1143, 1148 (6th Cir. 1978) (citations omitted); accord Thomas, 805 F.2d at 181-82 (upholding agency action where rational basis for agency action is presented). Special deference to an agency's fact finding is particularly appropriate when an agency's decision

rests on an evaluation of complex scientific data within the agency's technical expertise. BP Exploration & Oil, Inc. v. EPA, 66 F.3d 784, 792 (6th Cir. 1995) (courts "will defer in large part to EPA's scientific findings"). In reviewing an agency's decision that requires the exercise of technical or scientific judgment, a court is advised to "'look at the [agency's] decision not as the chemist, biologist, or statistician that [it is] qualified neither by training nor experience to be, but as a reviewing court exercising . . . certain minimal standards of rationality.'" Thomas, 805 F.2d at 182 (citations omitted).

In construing administrative regulations, the courts give "controlling weight" to the agency interpretation, "unless it is plainly erroneous or inconsistent with the regulation." United States v. Larionoff, 431 U.S. 864, 872 (1977). Accord National-Southwire Aluminum Co.v. EPA, 838 F.2d 835, 838 (6th Cir. 1988) ("agency's interpretations of its own regulations is entitled to special deference").

ARGUMENT

I. MR. LEVINE LACKS STANDING TO BRING THIS PETITION FOR REVIEW

The EPA previously moved to dismiss Mr. Levine's petition for review for lack of standing.[3/] EPA hereby renews that motion. Mr. Levine *never* had Article III or prudential standing to challenge the UIC permits issued to Jett Black, Inc., a corporation that has chosen not to contest those permits and the conditions imposed thereby on its operation of its UIC wells. The petition must thus be dismissed.

A. Mr. Levine Has Failed to Establish Standing Under Article III Because He Cannot Show Injury in Fact

"Standing is the 'threshold question in every federal case.'" Coyne v. American Tobacco Co., 183 F.3d 488, 494 (6th Cir. 1999), quoting Warth v. Seldin, 422 U.S. 490, 498 (1975). "Those who do not possess Art. III standing may not litigate as suitors in the courts of the United States." Valley Forge Christian College v. Americans for Separation of Church & State, 454 U.S. 464, 475-76 (1982); Allstate Ins. Co. v. Wayne County, 760 F.2d 689, 693 (6th Cir. 1985). Constitutional standing under Article III requires "proof of injury in fact which has a causal connection to the conduct being challenged . . . and which is likely to be redressed by a decision in the petitioner's favor." Michigan Gas Co. v. FERC, 115 F.3d 1266, 1270 (6th Cir. 1997); Lujan v. Defenders of Wildlife,

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[3/] See United States' Memorandum of Law Supporting its Motion to Dismiss for Lack of Standing, United States' Reply, and United States' Response to Surreply, all previously filed with this Court.

504 U.S. 555, 560-61 (1992); Cutshall v. Sundquist, 193 F.3d 466, 471 (6th Cir. 1999), cert. denied, 529 U.S. 1053 (2000).

The first requirement under Article III – injury in fact – mandates that a petitioner show that he "'personally has suffered some actual or threatened injury'" as a result of the allegedly illegal conduct of the defendant. Valley Forge, 454 U.S. at 472 (citation omitted); Coyne, 183 F.3d at 494. In essence, what is required to establish an injury in fact is that "the party seeking review be himself among the injured." Lujan, 504 U.S. at 563 (citation omitted).

Mr. Levine cannot show injury in fact. Mr. Levine is limited by law to representing only his own interests. See 28 U.S.C. § 1654. Yet, Mr. Levine is attempting to obtain relief, not for any personal individualized injury, but for alleged injury to another entity, Jett Black, that is not even a party to this petition.[4/] The two UIC permits that are the subject of this action were issued to Jett Black. (R. 114 EAB Order at 3, Apx. pg.____) They are not issued to or directed toward Mr. Levine.

[4/]This is not a case in which Jett Black, the third party whose interests Mr. Levine purports to represent, has been prevented from asserting its own rights. See Allstate Ins. Co., 760 F.2d at 693. Instead, for whatever reason, the corporation has chosen not to file a petition for review.

In an attempt to support his claim of standing under Article III, Mr. Levine apparently contends that EPA's regulation of Jett Black's UIC wells will cause environmental harm – in particular, potential damage to Mr. Levine's drinking water well – and will also result in unidentified economic burdens to Mr. Levine. He also claims that he "has worked on the injection wells at issue and will almost certainly do so in the future," and thus he has a "personal interest" in the conditions in Jett Black's UIC permits. Pet. Resp. Br. at 3-4. The record supports none of these assertions. Instead, the record reflects that any alleged economic impact would affect Jett Black, not Mr. Levine, who is, at best, merely Jett Black's agent. Moreover, Mr. Levine's claim that he is seeking to protect his drinking water supply is *completely unsupported* by the record. Instead, the record demonstrates that the petitioners to EPA – including Mr. Levine – sought to weaken or eliminate UIC permit conditions designed to protect drinking water supplies.

1. Mr. Levine's Attempt to Base Article III Standing on His Concern for the Environment is Unfounded

Mr. Levine claims that he has Article III standing because he is seeking to protect his drinking water supply. There is no basis, however, for this contention. Indeed, the relief Mr. Levine sought from the EAB and that he now

seeks from this Court is more likely to worsen any alleged injury than to reduce it. An examination of the Environmental Appeals Board's Order Denying Review in Part and Remanding in Part (May 27, 1999) (R. 114 EAB Order, Apx. pg.___), reveals that all of the claims of the petitioners -- including Mr. Levine -- were aimed at either *eliminating* the requirement to have UIC permits, or modifying the permit conditions to make them *less* stringent than the permit EPA issued. None of the petitioners before the EAB raised *any* issue of protection of drinking water supplies, or indeed any issue at all involving environmental protection. (See generally R. 114 EAB Order, Apx. pg.___) Indeed, quite to the contrary, the evidence reveals that Mr. Levine claimed to EPA that no underground source of drinking water exists, and therefore, by extension, that no permits were necessary to protect anyone's drinking water. Pet. Surreply (see also R. 114 at 112 EAB Order, Apx. pg.___)

Jett Black and Levine's Combined Formal Written Comments on Draft UIC Permits (R. 4) reflect Mr. Levine's goal of reducing or eliminating UIC requirements. For example, he sought to eliminate the requirement for mechanical integrity testing, which is designed to protect against significant leaking and fluid movement into underground sources of drinking water. (R. 4 at

2, 4); 40 C.F.R. § 146.8(a). In addition, if such testing were to be required, he then sought to eliminate the requirement to report test results to EPA except in exceptional circumstances. (R. 4 at 6)

Mr. Levine's lack of interest in protecting the environment is further demonstrated by the fact that he is not seeking to *require* the use of the allegedly safer gel or an open annulus. He merely wants them as options. Because Mr. Levine is not asking the Court to require these conditions, the relief he seeks in his petition will not redress the alleged injury to his water supply, as Jett Black could still choose to use instead one of the approved annular additives and a closed annulus.

2. Mr. Levine's Attempt to Base Article III Standing on Purported Economic Injury Must Fail Because Any Such Injury is Speculative and Conjectural

Mr. Levine's claims of alleged economic injury should also be rejected by this Court. To satisfy Article III's standing requirements, Mr. Levine must show that he has suffered an injury in fact that is 'actual or imminent, not conjectural or hypothetical . . . .' Friends of the Earth, Inc. v. Laidlaw Envtl. Serv., 528 U.S. 167, 180-81 (2000). Mr. Levine's claims of anticipated economic injury are, at best, vague, as well as wholly speculative and hypothetical.

In essence, Mr. Levine claims that at some unspecified future time there may be some unspecified economic impact from the operation of Jett Black's UIC permits that may affect him or others in some unspecified manner. Pet. Resp. Br. at 3-5. As EPA demonstrated in its Motion to Dismiss, even assuming that there were any such injury and that such injury could serve as a basis for standing, only Jett Black, the permittee, would experience any alleged economic effects from the operation of the permits. See United States Reply to Resp. to Mot. to Dismiss at 4-5. Accordingly, not only do Mr. Levine's claims amount to nothing more than conjecture and hypothesis, but also the object of the claimed economic impact would be Jett Black rather than Mr. Levine. Thus, Mr. Levine has provided no basis for this Court to exercise jurisdiction.

B. Mr. Levine Has Also Failed to Show Standing Under Article III Because He Cannot Show Causation and Redressability

In addition to showing injury in fact, standing under Article III requires a showing of causation and redressability. Steel Co. v. Citizen's for Better Env't, 523 U.S. 83, 104 (1998). Mr. Levine argues that he has standing because, as an operator of injection wells, a violation of the permit conditions could result in civil penalties against not only the permittee, but also against him as an operator. Pet. Surreply at 3. This argument fails, even if there could conceivably be

"injury in fact," because there is no causal connection between the action he challenges -- namely, the permit conditions -- and the "injury" he alleges. See, e.g., Michigan Gas Co. v. FERC, 115 F.3d at 1270.

Mr. Levine believes the permits are too stringent, and he fears prosecution for violation of the terms as the operator of the injection wells. However, whether Mr. Levine is prosecuted for such violations is solely within his own control. Mr. Levine has not alleged that the terms of the permit are so vague that he would be unfairly subjected to a likelihood of prosecution. Rather, the terms of the permit are clear and straightforward, and Mr. Levine is clearly on notice as to those terms. Simply stated, the relief that Mr. Levine requests – that the terms be modified to allow the use of annulus gel and an open annulus – would not relieve Mr. Levine from the possibility of prosecution if he operates the wells in violation of the permits. It merely alters the conduct that could be considered a violation. Thus, there is no causal connection between the conduct being challenged, here that the terms of the permits are too stringent, and the potential injury – prosecution for violating those terms. Accordingly, Mr. Levine lacks Article III standing.

C. Mr. Levine Does Not Meet Prudential Standing Requirements

Although it is not necessary for this Court to reach the issue of prudential standing because the requirements for Article III standing have not been met, American Fed'n of Gov't Employees v. Clinton, 180 F.3d 727, 733 (6th Cir. 1999). Cert. denied, 529 U.S. 1081 (2000), the prudential limitations on standing also provide a strong basis for dismissal of this action. This Court has recognized additional "prudential standing restrictions," Coyne, 183 F.3d at 494, that "are separate and apart from th[e] . . . [constitutional] mandatory jurisdictional prerequisites. . . ." Allstate Ins. Co., 760 F.2d at 693. "These additional restrictions enforce the principle that, 'as a prudential matter, the plaintiff must be a proper proponent, and the action a proper vehicle, to vindicate the rights asserted.'" Coyne, 183 F.3d at 494 (quoting Pestrak v. Ohio Elections Comm'n, 926 F.2d 573, 576 (6th Cir. 1991)). Prudential standing requirements are applicable to the SDWA. See International Fabricare Ins't v. EPA, 972 F.2d 384,387 (D.C. Cir. 1992).

The "most prominent" of these prudential limitations is that a plaintiff must assert his *own* legal rights and interests, not the legal rights and interests of another. Allstate Ins. Co., 760 F.2d at 693. As this Court has held:

> Courts do not decide cases based on the rights of third parties because 'it may be that in fact the holders of those rights either do

> not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not,' and 'third parties themselves usually will be the best proponents of their own rights.'

Id. (quoting Singleton v. Wulff, 428 U.S. 106, 113-114 (1976)).

Mr. Levine does not satisfy the "most prominent" prudential standing requirement because he is not asserting his *own* legal rights and interests. Allstate Ins. Co., 760 F.2d at 693.

1. The SWDA Does Not Provide Mr. Levine Standing

Prudential standing limitations apply to actions brought under the SDWA. International Fabricare Ins't, 972 F.2d at 387. Mr. Levine apparently contends, however, that through the SDWA judicial review provision, section 1448j-7(a) 42 U.S.C. § 300j-7(a), Congress has granted a right of action to those who would otherwise be barred from suit by prudential standing limitations. Pet. Resp. Br. at 5. Mr. Levine presents no legal support for his argument that the SDWA judicial review provision is intended to waive prudential standing constraints.

Section 300j-7(a) provides in pertinent part that:

> A petition for review of * * * any other final action of the [EPA] Administrator under this chapter may be filed in the circuit in which the petitioner resides or transacts business which is directly affected by this action.

Neither the relevant quoted language nor the balance of this provision evinces any intent on the part of Congress to override prudential standing requirements. As a matter of statutory interpretation, Congress is presumed to incorporate prudential standing principles, unless the statute expressly negates them. Bennett v. Spear, 520 U.S. 154, 163 (1997) ("Congress legislates against the background of our prudential standing doctrine, which applies unless it is expressly negated").

In Bennett, 520 U.S. at 164, the Supreme Court found that the Endangered Species Act citizen suit provision, 16 U.S.C. § 1540(g), contained what it viewed as an *extremely* broad authorization that "any person may commence a civil suit. . . ." The Court interpreted this provision to be an express negation by Congress of prudential standing limitations. By contrast, in the instant case, the statutory provision at issue is not a citizen suit provision, but a judicial review provision that differs both in content and nature from citizen suit provisions. Unlike the citizen suit provision of the Endangered Species Act, the judicial review provision of the SDWA does nor purport to allow review by *any* person. More importantly, there is no indication whatsoever in this judicial review provision of any intent by Congress to negate prudential limitations.

Mr. Levine also asserts that a passage from the SDWA shows that economic interests were an explicit concern of Congress and that such language confers standing on the regulated community, especially the domestic oil industry. Pet. Surreply at 3-4. The relevant section of the SDWA provides that EPA "may not prescribe requirements which interfere with or impede" the underground injection for secondary recovery of oil "unless such requirements are essential to assure that underground sources of drinking water will not be endangered by such injection." 42 U.S.C. § 300h(b)(2). This provision demonstrates Congress' concern for balancing the needs of the Nation to obtain oil against the threat such activity could impose on drinking water. This provision only applies, however, to requirements that interfere with or impede production of oil or natural gas, a claim not made in this case below. Philips Petroleum Co. v. EPA, 803 F.3d 545, 561 (10th Cir. 1986). Thus, although the SDWA does recognize the economic interests at stake in this limited fashion, this provision can hardly be stretched into conferring standing on Mr. Levine merely because he is employed by a company operating in the domestic oil industry.

2. Mr. Levine Lacks Standing to Advance the Rights and Interests of a Third Party

As already demonstrated, supra at 22-24, Mr. Levine is not the proper proponent herein because any rights and interests arising out of EPA's actions on the two UIC permits at issue extend only to Jett Black, the permittee, and not to Mr. Levine. See Coyne, 183 F.3d at 494. Accordingly, under prudential principles Mr. Levine lacks standing to advance the rights and interests of Jett Black, and this deficiency is an additional sound basis for dismissal of this action. Id.

II. THE PERMIT CONDITIONS AT ISSUE ARE NECESSARY TO ENSURE PROTECTION OF UNDERGROUND SOURCES OF DRINKING WATER

The Safe Drinking Water Act regulations require that Underground Injection Control permits include conditions necessary to prevent migration of fluid into underground sources of drinking water. 40 C.F.R. § 144.52(a)(9). The permit conditions imposed by EPA in Jett Black's permits are necessary and rational, and EPA is entitled to deference on interpretations of its own regulations, especially when they are of a technical nature as here.

A. EPA Reasonably Denied Mr. Levine's Request to Use the Proposed Gel as an Annular Additive

EPA's decision to deny Mr. Levine's request to add the proposed annulus gel to the list of approved annular additives was based on rational factors as set

forth in the record. EPA primarily based its decision on two factors. First, because the proposed gel will not inhibit corrosion in the annulus area it will not help maintain the mechanical integrity of the injection wells, which is the cornerstone of the underground injection control program for Class II wells. Second, the use of the proposed gel may mask the presence of a leak by temporarily plugging small holes during mechanical integrity tests.

Based on the reasoning set forth in response to EAB's remand and on the evidence in the record, it is clear that EPA's decision to reject the use of the proposed gel was neither arbitrary nor capricious and that it must be upheld.

1. The Ability of Annular Fluid to Inhibit Corrosion is Important to Maintain the Integrity of the Wells and Annulus Gel has Not Been Shown to Inhibit Corrosion

Owners and operators of wells must prevent the fluid that is injected through the tubing for enhanced recovery purposes, and other fluids that may contain contaminants, from escaping into underground sources of drinking water. 40 C.F.R. § 144.12. One way to prevent this escape is to maintain the integrity of the well tubing and casing, because tubing and casing that are not corroded are less likely to leak. An important criterion, therefore, in determining the type of fluid that may be placed in the annulus is whether it will prevent or inhibit

corrosion of the tubing and casing. The gel that Mr. Levine champions has not been shown to inhibit corrosion of the tubing and casing. That fact alone is sufficient to support EPA's determination that it is not appropriate as an annular additive. (R. 115 EPA response to EAB partial remand, Apx. pg.____)

Because protecting against corrosion is an important component of maintaining a well's integrity, before an additive can be placed in the annulus, it must be approved by EPA. The additives EPA has approved have all been tested by the manufacturer for their corrosion inhibiting properties and are specifically marketed for use in the annulus. Because the proposed gel has never been marketed for use in the annulus, no tests have been performed on its suitability as an annular additive and there is no evidence that it will inhibit corrosion.[5/]

Mr. Levine asserts that the proposed gel is appropriate for use because it is not corrosive. As EPA has explained, whether or not the gel will cause corrosion is irrelevant. What is important is whether it will *inhibit* corrosion by other fluids in the well and thus minimize leaks from the well. Mr. Levine has

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[5/] EPA has developed a process for parties to demonstrate that additives other than those previously approved are suitable annulus fluids. (R. 96 UIC workgroup report, Apx. pg.____) As explained by EPA, parties may submit a request for approval following the guidance developed in 1998 by the UIC National Technical Workgroup. (R. 115 EPA response to EAB partial remand, Apx. pg.___) No such request has ever been submitted for the proposed gel.

offered no evidence on this critical issue, and it is therefore not surprising that EPA has not approved the proposed gel's use as an additive. Indeed, the only "evidence" that Mr. Levine cites in the record to support his belief that the gel is appropriate for use in the well annulus is his own unsupported opinions as set forth in his January 2001 petition to the EAB (R. 116 Second Pet. for Review, Apx. Pg.___) and on his web page (R. 122 AnaLog Web Page, Apx pg.___). Because the proposed gel has not been shown to inhibit corrosion, EPA reasonably declined to allow its use as an annular additive.

2. Because the Proposed Gel Could Mask Leaks, It is Not an Appropriate Additive for Use in Injection Wells

EPA also explained in its response to the EAB partial remand that it is concerned that the use of gel could mask a leak in the well that could lead to contamination of underground sources of drinking water. As stated by the Region:

> In particular, *the gel could conceivably fill a leak in injection tubing or the long string casing, enabling the well to demonstrate mechanical integrity, and later become displaced, resulting in a loss of mechanical integrity*. Such a loss of mechanical integrity would violate the 40 C.F.R. § 144.51(q) requirement that the well owner or operator maintain the wells' mechanical integrity. Furthermore, should the gel mask a leak, that could violate the 40 C.F.R. § 144.12 mandate that no owner or operator operate or maintain any injection

> activity in a manner that allows the movement of any fluid containing contaminants into underground sources of drinking water.

(R. 115 EPA response to EAB partial remand, Apx. pg.__) (emphasis added)

Again, the evidence that Mr. Levine points to in the record to support his contrary view is nothing more than his unsupported opinion. He claims that Jett Black should be allowed to use gel because it "is a safe and effective solution available to the smallest 'mom and pop' oil operators for minimal cost." Petitioner's Br. at 16. In reality, because the gel can temporarily plug up small holes, an owner or operator using Mr. Levine's "solution" could pass a mechanical integrity test although the well has leaks that could potentially cause groundwater contamination. Because these tests are normally only performed every five years, the gel "plug" could easily fail in the interim and these small leaks could introduce contamination into the groundwater, without detection. It is because of this possibility that the UIC workgroup recommended that, among other criterion, proposed annular additives demonstrate their ability to be effective as a plug in the long term as a requisite to approval. (R. 96 UIC workgroup report, Apx. pg.___)

Mr. Levine in fact *admits* that one of the reasons he favors the use of the gel is its ability to repair "very small leaks." (R. 122 at 2 AnaLog Web Page,

Apx. pg.___) He opines that these leaks are not significant and that the repair would be permanent. Id. He offers no facts to back up his opinion. Indeed, he acknowledges EPA's concern that the use of the gel can mask leaks in the well tubing and casing, but dismisses that concern by stating that "all [the gel] can do is allow an injection well to pass an *overly sensitive* [mechanical integrity test] . . . ." Id. (emphasis added).

EPA found on the record that the proposed gel has not been shown to be protective of the environment; it is, at best, a quick, temporary plug for small leaks, one that can ultimately result in misleading mechanical integrity test results and a serious risk of drinking water contamination. That determination was certainly reasonable and should be upheld.

3. **The Refusal to Allow the Use of the Proposed Gel is not a Reversal of Region 4's Past Practices**

Mr. Levine avers that the proposed gel has been approved and used in Region 4 in the past. In response, the Region undertook a review of its files and interviewed several UIC inspectors with years of experience in the field. Based on this, the Region concluded that "[it could] find no instances where gel was approved for use as an annular fluid additive in Region IV . . . . [and could] find no evidence to support the contention that the Region's decision not to allow the

use of gel is a reversal of Region IV's past practices." (R. 115 EPA response to EAB partial remand, Apx. pg.___)

Mr. Levine's assertion that he has witnessed the *use* of this gel by other well operators is irrelevant. The mere use of the gel by others does not in any way indicate that EPA has *approved* of that use. The "evidence" cited by Mr. Levine to support his assertion, moreover, is simply not credible. For example, Mr. Levine quotes his own deposition testimony in United States v. Levine & Assoc., et al., C.A. No. 4:97CV-169M (W.D. Ky.) (hereinafter "enforcement action").[6/] He claims that his deposition testimony sets forth facts that were "unambiguous and uncontradicted that annulus gel has been used in . . . Kentucky." A review of his deposition, however, reveals only unsupported statements by Mr. Levine that he "knew it had been used" and that the idea had been "introduced to [him] by EPA personnel." (R. 117 Levine deposition, Apx. pg.___) He offered no details of when the gel was used or who used it. Indeed, when asked to identify other users, he merely stated: "I think I know a few," but refused to elaborate. Id. Nor did he identify the EPA person who allegedly

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[6/] This action was initiated by EPA to enforce the terms of an Administrative Order on Consent concerning different injection wells that are located nearby the wells that are the subject of this petition.

introduced the idea of annular gel to him. Such unsubstantiated testimony hardly constitutes credible evidence either of use of the proposed gel within Region 4 or of the Region's alleged approval of such use.

In the second petition for review to the EAB, Mr. Levine alleged for the first time that Kenneth Ingle (Jett Black's predecessor) had told him that he had used the gel and that EPA Region 4 had approved that use. (R. 116 at 6 Second Pet. for Review, Apx. pg.___) Again, this is nothing more than a naked assertion on Mr. Levine's part. In the absence of an affidavit or other documentary evidence, Mr. Levine's hearsay recollection of what Mr. Ingle allegedly told him carries no weight. Moreover, Region 4 could find no evidence that it had approved use of the gel. (R. 115 EPA response to EAB partial remand, Apx. pg.__)

Mr. Levine also relies upon the contents of an "obsolete . . . floppy disc" that he claims contains letters that he wrote to EPA and the Petro Supply Company about the use of the proposed gel in May and June of 1990, November 1994, and April 1997. (R. 118, 119, 120) He claims that these letters amount to evidence that EPA had allowed use of the proposed gel in the past. Again, though, the letters are unsupported. After a diligent search, EPA Region 4 has

not been able to locate *any* evidence supporting Mr. Levine's averment that Region 4 had previously approved the use of such gel as an annular additive. There is therefore no merit to Mr. Levine's assertions that Region 4 has reversed a prior policy allowing the use of such gel.

EPA's decision to disallow the proposed gel as an annular additive is a rational decision made to ensure that EPA fulfills its mandate to prevent contaminated fluid from entering into an underground drinking water source.

EPA has determined that the type of fluid used in the annulus is important to the overall integrity of the wells. In rejecting the use of the proposed gel, EPA considered the relevant factors and made no clear error of judgment. See, e.g., Citizens to Preserve Overton Park, 401 U.S. at 416; accord BP Exploration & Oil Co. v. EPA, 66 F.3d 784, 792 (6th Cir. 1995). The fact that Mr. Levine disagrees is not enough. See Sierra Club v. Slater, 120 F.3d 623, 633 (6th Cir. 1997) (even though plaintiff believes defendant reached wrong conclusion, plaintiff's unsupported views do not allow a finding that agency's decision was arbitrary and capricious). EPA's action rejecting the request to approve the proposed gel as annular additive should be upheld.

B. EPA Reasonably Required a Closed Annulus

In his petition, Mr. Levine argues that present UIC regulations do not require that the annulus of a well be closed or that annulus pressure be monitored to detect leaks. He opines that an open annulus is preferable to a closed annulus and that he can successfully monitor for leaks visually. Mr. Levine made the same arguments to the EAB. (R. 114 EAB Order at 20-21, Apx. pg.___) The EAB found that "the regulations authorize the Region to require monitoring of annulus pressure in appropriate circumstances," but ordered the Region to more fully explain why an open annulus is not appropriate. (R. 114 EAB Order at 21, Apx. pg.___) In response, EPA explained that an open annulus is less desirable because not all leaks rise to the surface of the annulus; therefore, not all leaks would be detectible if the only method to detect a leak was visual observation at the surface. (R. 115 at 3 EPA response to EAB partial remand, Apx. pg. ___) EPA's reasons are amply supported by evidence in the record and are neither arbitrary nor capricious. Accordingly, EPA's decision to require a closed annulus must be sustained.

1. The Record Demonstrates that a Closed Annulus Offers the Best Protection to Prevent Leaks from Endangering Underground Sources of Drinking Water

EPA properly and reasonably denied the request that Jett Black be allowed to operate its wells with an open annulus. EPA explained in response to the EAB's remand that to ensure leak detection, an annulus must be closed and monitored at a certain pressure. (R. 115 EPA response to EAB partial remand, Apx. pg.___) "With a closed annulus, any leak in the injection tubing, the outer well casing or the packer will result in a change in annulus pressure and hence leak detection." (R. 115 Region's response to EAB partial remand, Apx. pg.___)

Mr. Levine asserts that with shallow injection wells, such as he avers are at issue here, a leak is readily detected by the naked eye. While EPA agrees that it would be *possible* to visually detect some leaks from the injection tubing (because the fluid from such a leak would presumably rise to the surface and be visible in the open annulus), that is not the only manner in which a leak may occur. As stated by EPA:

> [T]his premise assumes there is no leak in the well's outer casing; for, if there were such a leak, it is quite possible that all liquids leaking from the injection tubing into an open annulus could leak through the outer casing and not accumulate in the annulus. Thus, a leak would not necessarily be visible to the naked eye. This problem would not occur with a closed annulus which is maintained and monitored at 0 psig.

(R. 115 EPA response to EAB partial remand, Apx. pg.___)

Moreover, to detect a leak visually, an owner or operator would have to observe the open annulus of each well constantly. Because that is not practical, some leaks (although conceivably visible to the eye) would go undetected between visits to the wells.[7/] If the annulus is closed, however, not only will virtually all leaks be detected whether they rise to the top of the annular space or not, but the fact that the annulus is closed will more than likely prevent any fluid from flowing from the annulus onto the ground. When the owner or operator makes the next inspection, he will readily observe that the pressure in the annulus has changed, know that a leak has taken place and be in a position to take appropriate action.

Mr. Levine maintains that "there is no regulatory requirement for annulus monitoring for Class II injection wells [and] there is no regulatory requirement for Class II injection wells that the annulus be closed." Petitioner's Br. at 19. Although the regulations do not specify that the annulus must be monitored or that the annulus must be closed, the regulations do require that an owner or

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[7/]Although Region 4 normally requires weekly checking of injection wells, it agreed to monthly checking for the wells at issue here. This less frequent visual inspection would exacerbate the concerns of relying on such inspections to detect leaks.

operator establish and *maintain* the mechanical integrity of the wells. See 40 C.F.R. §§ 144.28(f)(2), 144.51(q)(1). The regulations detail the methods available to demonstrate that mechanical integrity is being maintained, id. at § 146.8(b) and (c), and EPA has the authority to evaluate the method and to require that the methods used are generally accepted by industry.[8/] A standard method to demonstrate mechanical integrity is to monitor the annular pressure, which can only be accomplished if the annulus is closed. That requirement is set out in the subject permits. Thus, annulus pressure monitoring ensures that the mechanical integrity of the injection well is maintained, and the regulations clearly require such.

EPA thus issued the permits to Jett Black with a requirement that the annulus be closed and that annulus pressure at the wellhead be monitored on a monthly basis to ensure that the wells' mechanical integrity is maintained. The only evidence that Mr. Levine cites in favor of an open annulus consists of arguments made in the January 2001 petition to EAB (R. 116 Second Pet. for Review, Apx. pg.___) and documents that he has authored and put up on his web

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[8/]The regulations afford EPA considerable discretion in evaluating the owner or operator's tests. 40 C.F.R. § 146.8(e).

site.[9/] Mr. Levine's findings have never been peer-reviewed and should be discounted. His lengthy technical discussion in the EAB petition is not supported by any verifiable facts or by an expert opinion.

EPA considered Mr. Levine's arguments about the merits of an open annulus and disagreed with his viewpoint. In rejecting Mr. Levine's request for an open annulus, EPA gave a reasonable explanation as to why it requires a closed annulus. The Court should thus defer to EPA's interpretation of the regulations implementing the SWDA and to EPA's expertise in these technical matters. See, e.g., BP Exploration & Oil Co. v. EPA, 66 F.3d at 792 (special deference accorded to agency's scientific findings).

2. EPA Has Not Allowed Other Wells to Operate With an Open Annulus

Mr. Levine asserts in his petition that there are wells in the vicinity of Jett Black's wells that are operating with an open annulus. Under EPA's SDWA

[9/]Mr Levine concedes that one of the documents he cites (R. 123 AnaLog Web Page, Apx. pg.___) is "only peripherally relevant" to his petition. (R. 116 at 20 Second Pet. for Review, Apx. pg.___) One of the other documents cited by Mr. Levine (AnaLog Web Page Printout, "Annulus Monitoring - Closed or Open Annulus?" undated) is not in the record, and the Court should thus not take its contents into consideration. Even if this document were properly in the record, it would not add to the discussion as it simply repeats Mr. Levine's prior arguments and, for the most part, is a direct quote from his January 2001 petition to the EAB. (R. 116 Second Pet. for Review, Apx. pg.____)

regulations, however, all wells subject to the SDWA are required to maintain the mechanical integrity of the well. 40 C.F.R. §§ 144.28(f)(2) and 144.51(q)(1). EPA has determined that to maintain mechanical integrity, the annulus must be closed to enable monitoring of annular pressure. The suggestion that there may be other wells in the vicinity with an open annulus, and thus in violation of the SDWA, does not mean that Jett Black should be allowed to so operate. Thus, there is no merit to Mr. Levine's assertion that EPA has been inconsistent on this point.

III. EPA HAS BROAD AUTHORITY TO REGULATE UNDERGROUND INJECTION WELLS SO AS TO PROTECT ACTUAL AND POTENTIAL UNDERGROUND SOURCES OF DRINKING WATER

A. EPA Has Determined that a USDW Exists in the Area of the Jett Black Wells

Mr. Levine argues that EPA has no authority to regulate underground injection in the absence of a USDW. EPA, however, has determined that there *is* a USDW in the area of the subject wells, and Mr. Levine's argument regarding EPA's authority in the absence of a USDW is thus irrelevant. Moreover, Mr. Levine's argument that there is no USDW is based on nothing more than his misreading of pleadings filed by EPA in a separate enforcement action against Mr. Levine. EPA plainly has the authority to regulate the wells at issue here.

1. The Caseyville-Tradewater Formation is an Underground Source of Drinking Water

An underground source of drinking water ("USDW") is defined, in relevant part, by 40 C.F.R. § 144.3(a) as "an aquifer or a portion [of an aquifer] which contains a sufficient quantity of ground water to supply a public water system; and [c]ontains fewer than 10,000 mg/l total dissolved solids." EPA has determined that the minimum aquifer yield that could serve a public water system is anything over one gallon per minute and that an aquifer that meets that criteria

should be afforded protection as a USDW. (R. 63 at 2) This is in keeping with the mandate of the UIC program to protect potential and actual underground sources of drinking water from contamination by underground injection wells. See H.R. Rep. No. 93-1185, (1974), reprinted in 1974 U.S.C.C.A.N. 6454, 6480 (UIC program is intended "to assure that drinking water sources, actual and potential, are not rendered unfit for such use by underground injection of contaminants").

In the course of an independent litigation[10/] related to injection activity near the wells at issue here, EPA determined that a USDW does exist in the Easton Consolidated Oil Field in Hancock County, Kentucky, the same field in which the instant wells are located. (R. 73 JAF Oil opinion at 13-14, Apx. pg.__) The existence of a USDW was determined in the field by Mr. George Ford, an EPA enforcement officer. (R. 72 George Ford letter, Apx. pg.___) In August 1997, Mr. Ford conducted four flow tests at a spring located on property only one to two miles from the instant wells. From these tests, Mr. Ford concluded that there is evidence that an aquifer exists in the area with an average flow rate in excess of one gallon per minute. (R. 72 George Ford letter, Apx. pg.___) That

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[10/] United States v. JAF Oil Co., No. 4:95-CV-169-M (W.D. Ky.)

aquifer is known as the Caseyville-Tradewater Formation. (See R. 16, Ex. E; R. 43, Ex. E)

Recognizing that the regulations place the burden on the permit applicant to demonstrate that a USDW does *not* exist,[11/] Mr. Levine engaged the services of two experts whose reports are a part of the record. (R. 111, 112). One of the experts concluded, based on his review of a study of the geology of the area and well logs located within the area, that there are no aquifers in the area. The other expert concluded that the aquifers in the area produced a marginal source of ground water for a domestic well. (R. 111, 112)

Although EPA acknowledges that both experts are qualified, EPA does not agree with their conclusions, which were formulated by looking only at data, studies and maps. Unlike EPA, neither of these experts went out to the field to perform an aquifer test. A test in the field is clearly superior to a study of records, and the Court should defer to EPA's expertise in this matter.[12/] See,

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[11/] See 40 C.F.R. § 144.12.

[12/] Moreover, Mr. Ford's results were corroborated by an independent expert hired by EPA in the Levine enforcement action. (See Report of Gary R. Chirlin dated June 3, 1998, Apx. pg.___) Although this report is not a part of the record, the Court may consider it in rebuttal to Mr. Levine's averment for the first time in this proceeding, that EPA has previously conceded the absence of a USDW. Moreover, Mr. Levine has discussed the Chirlin report in documents

e.g., Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 377 (1989) (deferring to "informed discretion of the responsible federal agencies" especially in cases where the evidence before the agency "involves primarily issues of fact"); BP Exploration & Oil Co. v. EPA, 66 F.2d at 792 (according deference to agency's scientific findings); Wisconsin Valley Improvement Co. v. FERC, 236 F.3d 738, 746 (D.C. Cir. 2001) (court is not to weigh competing experts' opinions and should uphold agency action if agency "relied upon sufficient expert evidence to establish 'a rational connection between the facts and the choice made'") (citations omitted). Because EPA relied upon evidence in the record sufficient to support its findings, EPA's determination that a USDW exists in the area of Jett Black's wells should be upheld.

2. Mr. Levine is Wrong in His Assertion that EPA has Declared That no USDWs Exist in the Area of Jett Black's Wells

In his petition, Mr. Levine quotes from a legal memorandum submitted by the United States to the court in the Levine enforcement action. Pet. Br. at 13. Although he does not label his argument as such, Mr. Levine appears to argue that EPA is judicially estopped from asserting that a USDW exists, because the

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that are a part of the record. (See, e.g., R. 108)

United States allegedly asserted in its brief in the enforcement action that there is no USDW in the general area of Jett Black's wells. Pet. Br. at 13. In making this argument, Mr. Levine takes the language from the United States' enforcement brief out of context, ignores the statements made in the United States' reply brief in the enforcement action, and apparently overlooks the fact that EPA hired an independent expert whose findings corroborate the results of EPA's previous field test – that the Caseyville-Tradewater Formation constitutes a USDW located in the general area of the Jett Black wells. As Mr. Levine does not appear to contest the authority of EPA to regulate these wells if there *is* a USDW in the vicinity, Mr. Levine's petition must be denied.

Mr. Levine's argument that there is no USDW in the vicinity of the Jett Black wells appears to be based on his misunderstanding or misconstruction of one sentence in the United States' brief filed in support of its earlier SDWA enforcement action against Mr. Levine. In that sentence the United States stated that EPA had "a scientific basis for concluding no USDW [would] be endangered by Levine's injection activity." (United States' enforcement brief at 30, Apx. pg. ___) Mr. Levine takes this to mean that there is no USDW in the area of Jett Black's wells. But, in the limited context of evaluating whether a certain well

test proposed by Mr. Levine would be allowed, the sentence means only that EPA concluded that no USDW would be *endangered* by that test, *not* that a USDW does not exist.

As has already been discussed, supra at 45-46, one core requirement of the UIC regulations is that the owner or operator of an underground injection well must ensure the well's mechanical integrity, usually through periodic performance of certain tests. In the United States' enforcement brief, the United States noted that Mr. Levine had requested permission from EPA to test his injection wells for mechanical integrity using a variant radioactive tracer survey ("RTS") test, as opposed to the more commonly used Standard Annular Pressure Test. (See 40 C.F.R. § 146.8(b)(2) EPA ultimately approved of Mr. Levine's use of the variant RTS test, and it is the language used by the United States' in its explanation of why the test was allowed that Mr. Levine misunderstands.

To satisfy the mechanical integrity requirement, a two-part demonstration of mechanical integrity is performed. First, internal mechanical integrity is tested to ensure that there is no significant leak in the casing, tubing or packer. 40 C.F.R. § 146.8(a)(1). Second, the *external* portion of the well is tested to determine the integrity of the cement placed between the casing and the rock

formations. 40 C.F.R. § 146.8(a)(2). Additionally, 40 C.F.R. § 146.8(f) requires that the owner or operator demonstrate that there is no movement of fluid into or *between* USDWs.[13/]

EPA was comfortable that the variant RTS that Mr. Levine proposed would be adequate to demonstrate the *internal* mechanical integrity of the wells and that there would be no movement of a fluid from a well into a USDW. However, the variant test proposed by Mr. Levine was not capable of demonstrating that there was no flow *between* USDWs. Certain factual findings concerning the geology in the area, described in the report by Mr. Levine's expert, allowed EPA to conclude that there is only *one* USDW in the area – the Caseyville-Tradewater Formation. EPA was, therefore, willing to allow Mr. Levine to use the variant RTS to satisfy both parts of the mechanical integrity demonstration, because EPA was no longer concerned about the possibility of flow *between* USDWs in contravention of 40 C.F.R. § 146.8(f).

Explaining this determination in its brief in the enforcement action, the United States stated that, as a result of the evidence offered by Mr. Levine, EPA

[13/]Aquifers are typically situated one atop another, with rock in between them, like the layers of a cake. 40 C.F.R. § 146.8(a)(2) ensures that contamination in one aquifer will not spread to others through vertical channels in the rock.

now had "a scientific basis for concluding no USDW [would] be endangered by Levine's injection activity." (United States' enforcement brief at 30, Apx. pg. ___) Mr. Levine seizes on this sentence and turns it on its head, arguing that it must stand for the proposition that there is *no* USDW in the vicinity of the Jett Black wells. Indeed, Mr. Levine tried to make a similar argument in the enforcement action, based on the same sentence. However, as the United States explained in its reply brief in that action:

> Defendants misconstrue that statement to say that EPA has concluded no USDW exists in the area. That is not the case - there is, most definitely underground drinking water in the area. Levine himself uses it to supply drinking water to his home. However, the yield tends toward the minimum that would be considered a USDW.

United States' Reply Brief at 2, n.1. The fact that a yield may be low, however, does not mean that an aquifer is not a USDW subject to protection under the Act.

In short, the bulk of Mr. Levine's argument that EPA had no authority to regulate the Jett Black wells is based on his fundamental misunderstanding of what the United States said in the enforcement proceeding. It should therefore be disregarded.

C. EPA Clearly Has the Statutory Authority to Regulate All Injection Wells Regardless of the Proximity of an Underground Source of Drinking Water

1. The SDWA Grants EPA Broad Authority to Regulate All Injection Wells

Mr. Levine argues that EPA lacks authority to regulate underground injection wells unless there is an adjacent USDW.[14/] To the contrary, EPA clearly has the authority to regulate any underground injection in furtherance of the statutory purpose of protecting against even the potential for drinking water contamination.

Mr. Levine attempts to analogize the finding in Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) to support his allegation that EPA has overstepped its jurisdictional bounds by its regulation of Jett Black's wells. In SWANCC, the Supreme Court held that Congress did not intend the Clean Water Act to regulate non-navigable, isolated, intrastate waters solely on the basis of their use as a habitat by migratory birds.

[14/] We do not read Mr. Levine's brief or petition as challenging the underlying regulations. Indeed, Mr. Levine purports to seek relief pursuant to 40 C.F.R. § 144.16 and he expressly states that he is challenging EPA's interpretation of that regulation. Pet. Br. at 22-23.

That case turned on the statutory interpretation of terms in the Clean Water Act, namely, "navigable waters" and "waters of the United States."

The language of the SDWA, however, is far broader than the language at issue in SWANCC, and SWANCC is therefore inapposite. Under the SDWA, EPA has the authority, indeed the obligation, to regulate any underground injection, regardless of the proximity of a USDW. For example, the Act requires that a State seeking approval of its UIC program must meet minimum requirements including prohibiting "*any* underground injection . . . which is not authorized by a permit [or authorized by rule]." 42 U.S.C. § 300h(b)(1) (emphasis added). The Act defines underground injection to mean "the subsurface emplacement of fluids by well injection." 42 U.S.C. § 300h(d)(1). The absence in these provisions of any reference to the proximity of underground sources of drinking water demonstrates that Congress intended that *all* underground injection activity falls within the ambit of the Act.

Because of its concern over the Nation's drinking water supply, Congress' choice of language in the SDWA was intentionally broad. As set forth in the SDWA, drinking water sources are "endangered" if any underground injection "*may* result in the presence in underground water which supplies or can

reasonably be expected to supply any public water system of any contaminant . . . ." 42 U.S.C. § 300h(d)(2) (emphasis added). Congress' concern for even *potential* sources of drinking water is echoed throughout the legislative history of the Act. In enacting the SDWA, "the clear overriding concern of Congress was that of 'assuring the safety of present and *potential* sources of drinking water.'" Philips Petroleum Co. v. EPA, 803 F.2d at 560 (quoting H.R. Rep. No. 93-1185, at 31 (1974), reprinted in 1974 U.S.C.C.A.N. 6454, 6484) (emphasis added). Additionally, "the phrase 'underground injection which endangers drinking water sources' is to be liberally construed so as to effectuate the preventative and public health protective purposes of the [SDWA]." Id. at 6484, quoted in Philips Petroleum at 560. Congress intended the UIC program to "assure that drinking water sources, actual and *potential*, are not rendered unfit for such use by underground injection of contaminants." H.R. Rep. No. 93-1185, at 26 (1974), reprinted in 1974 U.S.C.C.A.N. 6480. Congress specifically stated that "it is important to note that actual contamination of drinking water is not a prerequisite either for the establishment of regulations or permit requirements or for the enforcement thereof." Id. at 6484. It is from this broad

grant of authority that EPA promulgated the underground injection control regulations at issue here.

To carry out its mandate, the regulations enacted by EPA create a presumption of regulation for all injection wells, regardless of the presence of a USDW, because of the overriding need to protect even *potential* sources of drinking water. This was a reasonable response to the plain language of and Congressional intent behind the SDWA. Requiring that all underground injection occur within either a federal or state UIC program ensures that no such injection will contaminate a present or potential source of drinking water. Similarly, section 144.12(b) precludes *all* fluid movement into a USDW by a Class I, II or III well in order to ensure that no *endangering* fluid movement will occur. Under 40 C.F.R. § 144.16, a permittee may seek relaxation of the requirements; he is not entitled, however, to an automatic exemption from participation in the UIC program.

The general provisions of Part 144 of the UIC regulations state that the "SDWA provides that *all* underground injections . . . are unlawful and subject to penalties unless authorized by a permit or a rule." 40 C.F.R. § 144.1(e) (emphasis added). On their face, the regulations apply to "any dug hole or well

that is deeper than its largest surface dimension, where the principal function of the hole is emplacement of fluids." 40 C.F.R. § 144.1(g)(1)(ii) (defining regulated wells). The regulations could have stated, but did not, that to be applicable, an underground source of drinking water also had to be present. Moreover, under the section that lists wells that are specifically *excluded* from regulation, there is no exclusion for wells located in an area where no USDW exists. See 40 C.F.R. § 144(g)(2). This deliberate decision to subject *all* underground injection wells to regulation is repeated in Subpart B, General Program Requirements of Part 144: "Any underground injection, except into a well authorized by rule or except as authorized by permit . . . is prohibited." 40 C.F.R. § 144.11.

Additionally, Part 146 of the regulations, which contains the criteria and standards for the injection control program, classifies injection wells into five categories. See 40 C.F.R. § 146.5. Class II wells, which are the wells at issue here, are defined in relevant part as "[w]ells which inject fluids . . . (2) For enhanced recovery of oil or natural gas." Id. at § 146.5(b)(2). The definition of Class I wells, on the other hand, specifies that the well bore must be within one quarter mile of an underground source of drinking water. If not, the well is

regulated as a Class V well (which includes *all* wells not covered by Class I, II, II or IV). The definition of Class V wells, like Class II, does not contain any reference to the proximity of a USDW, thus proximity is not required.

Clearly, the Act intended, as the regulations evince, that all underground injection wells be subject to regulation. If proximity to a USDW were a necessary prerequisite to regulation, the SDWA would contain language to that effect and the regulations would have so provided.

2. EPA's Authority, Pursuant to 40 C.F.R. § 144.16, to Provide Less Stringent Permit Requirements in Limited Circumstances is Completely Discretionary

In their EAB petition, Jett Black and Levine asserted that no USDWs exist in the area of Jett Black's injection wells and that EPA should therefore waive the normal conditions imposed on injection wells pursuant to the authority granted under 40 C.F.R. § 144.16. The EAB did not even consider it necessary to weigh the merits of that argument because it found that "even if it were true that injection wells do not endanger USDWs," the Region was not required to provide relief under section 144.16 as that relief is completely discretionary. (R. 114 EAB Order at 13, Apx. pg.___)

This construction of the regulation was previously articulated by the court in United States v. JAF Oil Co., No. 4:95-CV-169-M (W.D. Ky. March 2, 1998), which found that the existence of a USDW was "irrelevant" and that EPA had the authority to regulate injection wells "even where there is no direct influence or danger to a USDW." (R. 73 at 14-15 JAF Oil opinion, Apx. pg.____) A similar finding was most recently made in the Levine enforcement action as set forth in two memorandum opinions and orders in United States v. Levine & Assoc., No. 4:97-CV-169-M (W.D. Ky.) dated March 30, 2001 (Apx. pg. ___) and July 9, 2001 (Apx. pg.__). In the July 9, 2001, memorandum opinion the court additionally held that when read as a whole, the preamble to the regulations found in the Federal Register did not support Mr. Levine's assertion that EPA had exceeded its statutory authority by regulating his wells. The court found that while the preamble speaks of "giving EPA discretion to determine how to regulate wells which do not inject into, through or above USDWs, there is nothing to suggest that these wells are exempt from regulation." (Apx. pg.___)

Nevertheless, Mr. Levine maintains that Jett Black is entitled to relief under 40 C.F.R. § 144.16 which provides in part:

> *When injection does not occur into, through or above an underground source of drinking water*, the [Region] may authorize a well or project with less stringent requirements for area of review, construction, mechanical integrity, operation, monitoring, and reporting than required [under applicable regulations] to the extent that the reduction in requirements will not result in an increased risk of movement of fluids into an underground source of drinking water.

40 C.F.R. § 144.16(a) (emphasis in original).

As the language of this provision makes explicit, the decision of whether to apply less stringent requirements is at the discretion of EPA. EPA considered whether a reduction in the requirements for the Jett Black wells was advisable and concluded that to do so would result in an increased risk of potential contamination of underground sources of drinking water.

In an attempt to bolster his argument, Mr. Levine cites section 1421(b)(2) of the SDWA for the proposition that "the agency's [underground injection control] regulations are not to interfere with or impede oil and gas related injections unless essential to protect a USDW." Petitioner's Brief at 23, 26-27. However, in using the words "interfere with or impede," Congress "did not intend to include every regulatory requirement which would necessitate the expenditure of time, money or effort." Phillips, 803 F.2d at 561. Rather, Congress intended to refer to those requirements that could stop or substantially

delay production of oil or natural gas. Id. The SDWA does not require EPA to subordinate the concern for protection of underground water sources to that of energy production. Id. Mr. Levine has produced no evidence showing that section 1421(b)(2) should prevent imposition of the requirements contained in the permits at issue, as he has made no showing that these requirements will impede or delay the production of oil from Jett Black's wells.[15/] Moreover, as the Phillips court recognized, the phrase "underground injection which endangers drinking water sources" is to be liberally construed so as to effectuate the preventative and public health protective purposes of the SDWA. Id. at 560. It is with that construction in mind that EPA's imposition of the permitting requirements at issue here should be upheld.

Thus, this Court should defer to EPA's discretionary authority in this matter and uphold EAB's denial of review.

CONCLUSION

For the foregoing reasons, this Court should dismiss the petition for lack of standing or deny it for lack of merit.

Respectfully submitted,

[15/]In any event, Mr. Levine has waived any argument that the permit conditions will impede or delay oil production, as he did not raise this argument below.

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