

despite a late start, “the hearing did not end until all of those who wanted to speak had an opportunity to present their oral comments.” *Id.* At the conclusion of the hearing, the Region extended the public comment period by an additional three weeks, allowing interested parties extra time to submit comments via mail or e-mail. *Id.* Based on substantial questions raised during the first public comment period regarding seismicity, the Region elected to reopen the public comment period pursuant to 40 C.F.R. § 124.14(b). *See* RTC at 1. The Region issued a public notice on August 11, 2013, requesting additional comment through September 11, 2013, on two discrete issues related to seismic activity.<sup>31</sup> *Id.* at 1, 23. The public had the chance to submit comments regarding the potential for seismic activity to affect the proposed well during the first public comment period, as well as during the second, more limited public comment period.

The Board observes that when the Region conducted the December 2012 hearing, it did so in response to a “significant degree of public interest” pursuant to 40 C.F.R. § 124.12(a)(1). The hearing allowed members of the public to express their concerns about the proposed well, including concerns about seismic activity. Although some Petitioners chose to leave before their turn to speak at the public hearing, the Region did afford them the opportunity to speak, thereby meeting its mandatory duty under the regulations. Thus, the Region properly fulfilled its mandatory duty to hold a public hearing. The Region had the discretionary option to hold a second public hearing based, in this case, on the reopened public comment period. *See* 40 C.F.R. § 124.12(a)(2) (stating that a permit issuer “may also hold a public hearing at his or her discretion, whenever, for instance, such a hearing might clarify one or more issues involved in the permit decision”). In reviewing an exercise of discretion by the permitting authority, the Board applies an abuse of discretion standard. *See In re Guam Waterworks Auth.*, NPDES Appeal Nos. 9-15 & 9-16, slip op. at

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<sup>31</sup> Specifically, the Region “requested additional public comment on its proposed findings that the well, as permitted, is unlikely to pose a risk of induced seismicity[,] and why any potential earthquakes would not pose a risk to the construction and operation of the injection well.” RTC at 1.

9 n.7 (EAB 2011), 15 E.A.D. \_\_\_\_\_. The Board will uphold a permitting authority's reasonable exercise of discretion if that decision is cogently explained and supported in the record. *See In re Ash Grove Cement Co.*, 7 E.A.D. 387, 397 (EAB 1997) ("[A]cts of discretion must be adequately explained and justified.").

Based on the information in the administrative record, the Board concludes that the Region's decision not to hold a second public hearing was a permissible exercise of discretion. The second public comment period allowed members of the public to submit additional comments regarding seismic activity, yet it was not the first opportunity to comment on seismic activity, as the public already had the opportunity during the first public comment period and the public hearing. The Board is aware that the Petitioners expended copious amounts of time and resources reviewing the administrative record, preparing comments and petitions for review, and becoming familiar with the procedural rules under 40 C.F.R. part 124. Nonetheless, the Region made clear in its Response to Comments that it worked diligently to provide the public with opportunities to participate as it developed the Permit, including two public comment periods that together totaled approximately eighty days and a public hearing during the first comment period. *See* RTC at 23. Accordingly, the Board denies Petitioners' request for additional time to allow the Region to further review their concerns.

*G. Other Claims Barred By Procedural Requirements*

Petitioners raise several other concerns before the Board that the Region addressed in its Response to Comments. These include (1) the location and depth of USDWs in the area of review and whether the proposed well presents a danger to drinking water wells; (2) the proposed wells' injection pressure and the possibility that injection will cause or exacerbate fractures; (3) the characterization and monitoring of the injection fluid; (4) the possibility that injection fluids may be hazardous or radioactive; (5) the existence of geothermal wells in the vicinity of the injection wells; (6) the need for an environmental impact statement ("EIS") pursuant to section 102 of the National Environmental Policy Act ("NEPA"); (7) the status of the Permit after its five-year

expiration date; and (8) the injection of additives such as corrosion inhibitors in addition to the injection fluids listed in the Permit. As discussed in more detail below, for each issue, the petitions fail to substantively confront the Region's responses or explain why the responses were erroneous or otherwise warrant Board review. Accordingly, the Board denies review.

### *1. Location and Depth of USDWs in the Area of Review*

Several Petitioners express concerns regarding the location and depth of USDWs in the area of review and question whether the proposed well might present a danger to drinking water wells.<sup>32</sup> In responding to these same concerns raised during the public process, the Region stated that no USDWs exist below 800 feet and that no conduits were identified within the area of review that would allow upward fluid migration into USDWs. *See* RTC at 4, 16. The regulations require well operators to identify all known wells that penetrate the proposed well's injection zone and, where appropriate, submit a corrective action plan to address any improperly sealed, completed, or abandoned wells in the area of review that might otherwise allow fluid to migrate into USDWs. *See* 40 C.F.R. § 144.55(a). Because no wells exist in the area of review that could serve as conduits for injection fluid, the Region concluded that the proposed well did not endanger USDWs. *See* RTC at 16. Petitioners have not confronted the Region's response on this issue nor have they demonstrated the Region clearly erred or abused its discretion. The Board thus denies review on this issue.

### *2. Injection Pressure*

Several Petitioners express concerns that the injection pressure from the proposed well will cause fracturing in the injection zone or

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<sup>32</sup> *See* Appeal Nos. 14-73 (Travis P. Smith); 14-74 (Daniel J. & Cindy J. Cryster); 14-80 (Brady Township); 14-82 (Valerie J. Powers); 14-86 (Leslie Swope); 14-87 (Barb Emmer); 14-88 (Laurie Wayne); 14-91 (Rev. James & Sherry Green); 14-94 (Vivian Marshall); 14-108 (Loretta Slattery); 14-174 (Darlene Marshall); 14-175 (Duane Marshall); 14-176 (Nancy Moore); 14-179 (City of DuBois); 14-187 (Marianne Atkinson).

might exacerbate existing fractures.<sup>33</sup> The Region thoroughly addressed this same concern in its response to comments. *See* RTC at 13-14. In particular, the Region stated, in part, as follows:

[T]he fracture pressure gradient for the Huntersville Chert/Oriskany formation ranges from 0.90 to 0.95 psi/ft. EPA used a gradient of 0.90 psi/ft to calculate the maximum injection pressure proposed in the draft permit. In the final permit, in response to comments requesting an even more conservative calculation of the injection pressure, EPA used a gradient of 0.88 psi/ft to calculate a maximum injection pressure to ensure the prevention of new fractures and the propagation of existing fractures in the injection zone during operation of the injection well.

*Id.* at 14. Further, as stated in Part IV.B of this decision, the Permit requires continuous monitoring of injection pressure, annular pressure, and flow rate as well as an automatic shut-off device in the event of mechanical integrity failure. Permit pt. II.C.2. Because Petitioners have failed to demonstrate that the Region clearly erred or abused its discretion or to confront the Region's responses to their comments, the Board denies review on this issue.

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<sup>33</sup> *See* Appeal Nos. 14-73 (Travis P. Smith); 14-80 (Brady Township); 14-107 (Terry & Carole Lawson); 14-174 (Darlene Marshall); 14-175 (Duane Marshall); 14-176 (Nancy Moore); 14-178 (Randall Baird); 14-187 (Marianne Atknison).



### 3. *Characterizing and Monitoring Injection Fluid*

A number of Petitioners assert that the Region failed to sufficiently characterize the injection fluid or to require proper monitoring.<sup>34</sup> In responding to similar concerns raised during the comment period, the Region stated that conditions in Parts II.C.3 and II.C.4 of the Permit will ensure that the injection fluid is adequately characterized and monitored. *See* RTC at 19. Part II.C.3 of the Permit requires that the permittee sample, analyze, and record the nature of the injection fluid at initial injection, and yearly thereafter, or whenever the operator observes or anticipates changes in the injection fluids, for the following parameters: pH, specific gravity, barium, specific conductance, iron, magnesium, chloride, dissolved oxygen, manganese, total dissolved solids, hydrogen sulfide, sodium, alkalinity, hardness, and total organic carbon. Part II.C.4. requires that “[s]amples of injected fluid shall be collected and analyzed from initial loads received from each disposal customer and each type of source (e.g., from different geologic formations, geographic regions, etc.). Minimum analyses of the fluid will include specific gravity, total dissolved solids, ph, and [total organic carbon]. Any analysis of specific gravity greater than 1.26 and any analysis of [total organic carbon] greater than 250 mg/l shall be reported to the [Region] within twenty four hours of the results.” These requirements are intended to ensure that Windfall injects only those fluids authorized by the Permit. RTC at 19. The Region stated that, if monitoring indicates that Windfall injected fluids not authorized by the Permit, Windfall would be in violation of the Permit and subject to enforcement action. *Id.* at 20. Because the Petitioners have failed both to demonstrate that the Region clearly erred and to confront the Region’s response to comments, the Board denies review of this issue.

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<sup>34</sup> *See* Appeal Nos. 14-80 (Brady Township); 14-86 (Leslie Swope); 14-87 (Barb Emmer); 14-88 (Laurie Wayne); 14-90 (Robert Green); 14-94 (Vivian Marshall); 14-96 (Dawn Smith); 14-174 (Darlene Marshall); 14-175 (Duane Marshall); 14-176 (Nancy Moore); 14-178 (Randall R. Baird); 14-179 (City of DuBois); 14-187 (Marianne Atknison).

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4. *Potentially Hazardous or Radioactive Injection Fluid*

A few Petitioners express concern that the injection fluid may contain hazardous or radioactive material.<sup>35</sup> In response to similar concerns raised during the comment period, the Region stated, in part, as follows:

[Injection Fluids,] when produced in association with oil and gas production, are exempt from hazardous waste regulation and are not classified as hazardous under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 et seq. In December 1978, EPA proposed hazardous waste management standards that included reduced requirements for several types of large volume wastes. Generally, EPA believed these large volume "special wastes" were lower in toxicity than other RCRA regulated hazardous wastes. Subsequently, Congress exempted the wastes from RCRA Subtitle C pending a study and regulatory determination by EPA. In 1988, EPA issued a regulatory determination that the control of oil and gas exploration and production wastes under RCRA Subtitle C was not warranted, in part because other State and Federal programs, such as the UIC program, effectively manage the disposal of such wastes. Therefore, the UIC program regulates fluids produced in association with oil and gas production activities, but not as hazardous waste. Disposal of these fluids is permissible down a Class II brine disposal injection well.

RTC at 18. Petitioners fail to confront the Region's response on this issue. Accordingly, the Board denies review on this issue.

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<sup>35</sup> See Appeal Nos. 14-73 (Travis P. Smith); 14-174 (Darlene Marshall); 14-178 (Randall R. Baird); 14-187 (Marianne Atkinson).

### 5. *Geothermal Wells*

On appeal, two Petitioners express concern that existing geothermal wells within the area of review could serve as conduits for injection fluid to reach USDWs.<sup>36</sup> This issue was also raised in comments on the draft permit. In response to those comments, the Region stated that geothermal systems “use very shallow wells that inject spent water back into the ground water that has circulated through the system. Because these systems involve very shallow wells, they do not create a pathway for contamination and would not be affected by operation of the injection well.” *Id.* at 17. Because Petitioners fail to confront the Region’s response, the Board denies review of this issue.

### 6. *Environmental Impact Statement*

Several Petitioners argue that the Region should prepare an EIS before issuing the Permit pursuant to NEPA section 102,<sup>37</sup> 42 U.S.C. § 4332.<sup>38</sup> As noted by the Region in its response, “RCRA [and] UIC \* \* \* permits are not subject to the [EIS] provision of section 102(2)(c) of [NEPA].” 40 C.F.R. § 124.9(b)(6); *see also In re Am. Soda, LLP*, 9 E.A.D. 280, 290-92 (EAB 2000); RTC at 24.<sup>39</sup> The Petitioners fail to

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<sup>36</sup> See Appeal Nos. 14-174 (Darlene Marshall); 14-175 (Duane Marshall).

<sup>37</sup> See Appeal Nos. 14-73 (Travis P. Smith); 14-87 (Barb Emmer); 14-88 (Laurie Wayne); 14-174 (Darlene Marshall); 14-175 (Duane Marshall).

<sup>38</sup> NEPA requires an EIS for “major Federal actions significantly affecting the quality of the human environment.” NEPA § 102(2)(c), 42 U.S.C. § 4332(2)(c).

<sup>39</sup> As this Board stated in *American Soda*, under the doctrine of “functional equivalency”:

[W]here a federal agency is engaged primarily in an examination of environmental questions, and where substantive and procedural standards ensure full and adequate consideration of environmental issues, then formal compliance with NEPA is not necessary, [and] functional compliance [is] \* \* \* sufficient.

(continued...)

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confront the Region's response on this issue. Thus, the Board denies review of this issue.

*7. Status After Permit Expiration*

Two Petitioners express concern about the status of the Permit after its five-year expiration date.<sup>40</sup> As the Region stated in its response to public comment on this issue, upon expiration of the Permit Windfall may seek renewal by submitting a new permit application. RTC at 24. If Windfall submits a renewal application, "EPA will review the history of Windfall's operation, as well as any information on the well obtained during the drilling or from pressure fall-off tests, and make a determination whether to reissue the Permit. EPA's tentative decision of whether to reissue or deny the permit for an additional term is subject to the same public notification and public comment process as an initial permit." *Id.* Because Petitioners fail to confront the Region's response, the Board denies review on this issue.

*8. Corrosion Inhibitors*

Three Petitioners raise concerns about the injection of additives such as corrosion inhibitors in addition to the injection fluids listed in the Permit.<sup>41</sup> As the Region stated in its response to comments on this issue, "the additives are not added to the [injection] fluid for purposes of disposal but rather to prevent corrosion in the injection well, and are often also used in production wells. The proper operation and maintenance of a Class II well can require use of such additives." RTC at 19. These corrosion inhibitors, referred to as "Alpha 2278" and

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<sup>39</sup>(...continued)

*Am. Soda*, 9 E.A.D. at 290-91 (quoting *Warren County v. North Carolina*, 528 F. Supp. 276, 286 (E.D. N.C. 1981)). The UIC program is the functional equivalent of NEPA. *Id.* at 291-92.

<sup>40</sup> See Appeal Nos. 14-87 (Barb Emmer); 14-174 (Darlene Marshall).

<sup>41</sup> See Appeal Nos. 14-175 (Duane Marshall); 14-178 (Randall R. Baird); 14-187 (Marianne Atkinson).



"Alpha 3207" are listed in Attachment "O" to the Permit application. See Region's Response Attach. 7. Petitioners do not confront the Region's response to comments on this issue or demonstrate that the Region clearly erred or abused its discretion. The Board therefore denies review.

In sum, Petitioners fail to substantively confront the Region's responses to each of the issues they raised during the public comment period or adequately explain why the Region's responses were clearly erroneous or otherwise warrant Board review. Accordingly, the Board denies review.<sup>42</sup> See *In re Pa. Gen. Energy Co.*, UIC Appeal Nos. 14-63 through 14-65, slip op. at 7 (EAB Aug. 21, 2014), 16 E.A.D. \_\_\_\_.

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<sup>42</sup> Two Petitioners raise concerns regarding the "serious consequences" that could result from "over-pressurizing the annulus of the long string casing." Appeal No. 14-175, at 5 (Duane Marshall); 14-188, at 3 (Richard L. Atkinson). Petitioners assert that the high pressure in the open annulus outside the long string casing could result in fluid migrating into USDWs. Because this issue was not raised in the comments on the draft permit, it was not preserved for review with the Board. The Board therefore denies review. See 40 C.F.R. § 124.19(a)(4)(ii) ("Petitioners must demonstrate, by providing specific citation to the administrative record, including the document name and page number, that each issue being raised was raised during the public comment period \* \* \*"). Moreover, the Permit contains casing and cementing requirements designed to prevent the movement of fluids into or between underground sources of drinking water. See Permit pt. III.A.2 (Casing and Cementing). In addition, the Permit prohibits injection until the permittee demonstrates that the well has mechanical integrity. See Permit pt. III.A.4 (Mechanical Integrity). Finally, the Permit includes provisions to prevent over-pressurization and protect USDWs. As the Region stated in the Statement of Basis accompanying the draft permit,

[t]he permittee will be responsible for monitoring injection pressure, annular pressure, flow rate and cumulative volume on a continuous basis and reporting this data to EPA on an annual basis. The permittee is also required to conduct a mechanical integrity test (MIT) once every two years and a pressure fall-off test annually. These tests will provide EPA with an evaluation of the integrity of the casing, tubing and packer in the well, documentation as to the absence of fluid movement into or between USDWs and flow conditions that exist in the injection zone during operation, thus helping to assure that USDWs are protected.

Statement of Basis at 3; see also Permit at 7-8, pt. II.C (Monitoring Requirements).

#### H. *Scope of Board Review*

Petitioners also raise the following issues that are beyond the scope of the Board's authority over this UIC permit appeal: (1) the effect of the proposed well on property values and future zoning decisions; (2) the subsurface mineral rights in the area surrounding the well; (3) the possibility of surface spills; and (4) the potential for Marcellus shale production wells to be permitted in the future.<sup>43</sup> As this Board previously has stated, "the UIC permitting process is narrow in its focus and the Board's review of the UIC permit decisions extends only to the boundaries of the UIC permitting program, which is limited to the protection of underground sources of drinking water." *In re Bear Lake Props.*, UIC Appeal No. 11-03, slip op. at 19 (EAB June 28, 2012), 15 E.A.D. \_\_\_\_ (citing cases). Because these claims are outside the Board's permitting review authority, the Board denies review on all these issues. *See In re Stonehaven Energy Mgmt., LLC*, UIC Appeal No. 12-02, slip op. at 10 n.6 (Mar. 28, 2013), 15 E.A.D. \_\_\_\_.

Finally, Petitioners question whether the permittee can be trusted to comply with the Permit.<sup>44</sup> Concerns regarding future noncompliance are speculative and do not call into question the terms of an otherwise valid permit. A permit appeal is not a forum to entertain speculations about future permit violations and enforcement. *See, e.g., In re Russell City Energy Ctr., LLC*, PSD Appeal Nos. 10-01 through 10-05, slip op. at 113-14 (EAB Nov. 18, 2010), 15 E.A.D. \_\_\_\_ (holding that "fear of lax enforcement by the permit issuer is not grounds for review of the permit"), *petition denied sub nom. Chabot-Las Positas Cmty. Coll. Dist. v. EPA*, 482 F. App'x 219 (9th Cir. 2012). The Board thus denies review on this issue.

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<sup>43</sup> The following petitions raise one or more of these issues: Appeal Nos. 14-73 (Travis P. Smith); 14-80 (Brady Township); 14-82 (Valerie J. Powers); 14-87 (Barb Emmer); 14-88 (Laurie Wayne); 14-107 (Terry & Carole Lawson); 14-108 (Loretta Slattery); 14-174 (Darlene Marshall); 14-175 (Duane Marshall); 14-176 (Nancy Moore); 14-178 (Randall R. Baird); 14-187 (Marianne Atkinson); and 14-188 (Richard Atkinson).

<sup>44</sup> *See* Appeal Nos. 14-87 (Barb Emmer); 14-88 (Laurie Wayne); 14-174 (Darlene Marshall); 14-175 (Duane Marshall); 14-176 (Nancy Moore).

V. *CONCLUSION*

For all of the reasons stated above, the Board denies the petitions for review of the Region's Permit decision in their entirety.

So ordered.

**Attachment A:  
Petitioners and Corresponding Appeal Numbers**

Travis P. Smith (14-73)	*John Hook (14-113)	*Julie & Matt Craig (14-153)
*Daniel J. & Cindy J. Crytser (14-74)	*Albert Marsh (14-114)	*Micheline Schwabenbauer (14-154)
*Ted & Rona Crytser (14-75)	*Barbara A. Marsh (14-115)	*R.G. Ziegler (14-155)
Norma Gregorio (14-76)	*Shirley Wells (14-116)	*Wanda Lockwood (14-156)
*Bernard Pifer (14-77)	*Harry Peoples (14-117)	*Donna Work (14-157)
*Ruth A. Reitz (14-78)	*Brenda Peoples (14-118)	*William Voris (14-158)
*Rodney Pifer, Jr. (14-79)	*Donna J. Gardner (14-119)	*Steven Cory Clark (14-159)
Brady Township Supervisors (14-80)	*John Parsons (14-120)	*Jennifer Hicks (14-160)
Sandy Township Supervisors (14-81)	*Kenneth R. Flanders (14-121)	*Amanda Torrell (14-161)
Valerie J. Powers (14-82)	*Sean Zimmerman (14-122)	*John Genevro (14-162)
Randell T. Powers (14-83)	*Emily Zimmerman (14-123)	*Bonnie Genevro (14-163)
*Kim Norris (14-84)	*Monica Lockhart (14-124)	*Donna J. Boring (14-164)
*Kathy Champion (14-85)	*David M. Kovall (14-125)	*Gale Wells (14-165)
Leslie Swope (14-86)	*Tom Nelen (14-126)	*Kerri Bojalad (14-166)
Barb Emmer (14-87)	*Sue Nelen (14-127)	*Ronald Greathouse (14-167)
Laurie Wayne (14-88)	*Lorraine Shaddock (14-128)	*Joyce Greathouse (14-168)
Ralph E. Hamby (14-89)	*Sharlene King (14-129)	*Peter L. Erickson (14-169)
Robert Green (14-90)	*Harriet J. Moyer (14-130)	*Dawn Erickson (14-170)
Rev. James & Sherry Green (14-91)	*Dennis R. & Terry L. Marsh (14-131)	*Jonell Reay (14-171)
Ethel Marshall (14-92)	*Donald W. Krach (14-132)	Margaret Cyphert (14-172)
Robert Marshall (14-93)	*Delores Krach (14-133)	*Brady&Patricia LaBorde (14-173)
Vivian Marshall (14-94)	*Tim Bodt (14-134)	Darlene Marshall (14-174)
*Beth Gilga (14-95)	*Grace Bergin (14-135)	Duane Marshall (14-175)
*Dawn Smith (14-96)	*Justin Kaufman (14-136)	Nancy Moore (14-176)
*Robert & Pauline Wells (14-97)	*Deborah Stolfer (14-137)	*Stephen W. Way (14-177)
*Del & Joan Spafford (14-98)	*Tia Carpenter (14-138)	Randall R. Baird (14-178)
*Timothy H. Turner (14-99)	*Kari Armagost (14-139)	City of DuBois (14-179)
*Susan G. Turner (14-100)	*Michael & Lacey Stockdale (14-140)	Diane Bernardo (14-180)
*James W. Mack (14-101)	*Craig Carpin (14-141)	*John M. Barr (14-181)
*Terrence & Susan Nasoni (14-102)	*Rhonda Charles (14-142)	*Tabatha Smith (14-182)
*Nora Jenney (14-103)	*Kenneth Doverspike (14-143)	*John E. Phillips (14-183)
*Helen Jenney (14-104)	*Courtney Thompson (14-144)	*Doug&Debbie Heberling (14-184)
*Rob and Edye Stewart (14-105)	*John M. Glabicki (14-145)	*Lesha Martinez (14-185)
*Cecil E. Gelnett (14-106)	*Mechele Foust (14-146)	Wilson Fisher, Jr. (14-186)
Terry & Carole Lawson (14-107)	*Nicole Ludwig (14-147)	Marianne Atkinson (14-187)
Loretta Slattery (14-108)	*Lynn Love (14-148)	Richard Atkinson (14-188)
*Darryl Beatty (14-109)	*Joyce Braun (14-149)	Rep. Matt Gabler (14-189)
*Judy Chewning (14-110)	*James Sykes (14-150)	Clearfield County (14-190)
*Francis E. Hand (14-111)	*Patty Thomas (14-151)	
*Rosemary Frizzell (14-112)	*Dennis J. Charles (14-152)	

\* Petitioners who filed identical petitions for review.



## CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **Order Denying Petitions for Review** in the matter of Windfall Oil & Gas, Inc., UIC Appeal Nos. 14-73 through 14-190, were sent to the following persons in the manner indicated.

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