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INTRODUCTION AND BACKGROUND

This matter involves Petitioner Peter Bormuth's petition for review ("Petition") of a Class II Underground Injection Control (UIC) permit, Permit No. MI-075-2D-0009 ("West Bay #22 Permit), issued by the U.S. Environmental Protection Agency Region 5 to permittee West Bay Exploration Company under the Safe Drinking Water Act, 42 U.S.C. §§ 300h-300h-8, and under the regulations at 40 C.F.R. Parts 124, 144-148. In his Petition, Petitioner cited a list of Class II UIC wells in Michigan that he claimed were similar to the West Bay #22 well and which he asked the Environmental Appeals Board ("Board") to somehow factor into his appeal. UIC 15-03, Filing #1, pp. 10-11. On April 15, 2016, Petitioner filed a Motion to Supplement, purportedly seeking to add an additional Class II UIC permit to this list, specifically the permit for the Savoy Energy Creque #3-20 SWD well, Permit No. MI-091-2D-0004 (Savoy Creque #3-20 Permit). UIC 15-03, Filing # 30; UIC 16-03, Filing #1. Region 5 responded to this motion on May 3, 2016, opposing addressing the Savoy Creque #3-20 Permit in this matter because Petitioner had other mechanisms for seeking review of the Savoy Creque #3-20 Permit and because addressing that permit in this matter would violate the Board's rules. UIC 15-03, Filing #31.

The Board ruled Petitioner's Motion to Supplement moot, as part of a Remand Order the Board issued on July 26, 2016 ("Remand Order") resolving this proceeding. UIC 15-03, Filing #33, p. 24, note 22. The Remand Order also remanded the West Bay #22 Permit to Region 5 for reconsideration, "taking into account the administrative record as a whole and all of the arguments raised by [Petitioner] in his public comments and in this proceeding", up through Petitioner's reply brief. UIC 15-03, Filing #33, p. 23. On August 1, 2016, Petitioner filed a

Motion for Clarification (“Motion”), seeking to have the Board terminate or pre-emptively revoke a pair of Class II UIC permits as part of this proceeding, specifically for the Haystead #9 well, Permit No. MI-075-2D-0010, (“Haystead #9 Permit) and the proposed Moore #3-14 well, Permit No. MI-075-2D-0014 (“Moore #3-14 Permit); and seeking to force Region 5 to address various additional arguments on remand.

Region 5 has until August 19, 2016, to respond to the Motion and responds here. 40 C.F.R. §§ 124.19(f)(3), 124.20(d).¹ Region 5 opposes the Motion in part, because the Board’s review is limited to the specific matter before it, for the reasons discussed below. Therefore the Board should deny the Petitioner’s motion to terminate or pre-emptively revoke the UIC permits that are not the subject of this appeal. Region 5 also opposes the Motion in part, because Petitioner seeks to have Region 5 address an argument appearing for the first time in the Motion. Regarding the remainder of the relief that Petitioner seeks, Region 5 will address Petitioner’s arguments on remand as the Remand Order requires.

ARGUMENT

1. The Board’s review is limited to the permit decision before it and therefore the Board should deny the Motion regarding the Haystead #9 and Moore #3-14 Permits.

Petitioner’s permit appeal currently before the Board (UIC 15-03) sought adjudication of whether Region 5’s issuance of the West Bay #22 Permit was clearly erroneous or otherwise warrants review. For the Board to extend its remand decision regarding the West Bay #22 Permit, to terminate or revoke two additional permits not subject to this appeal, would:

- circumvent the Board’s procedures for appealing a UIC permit

¹ Due to its lack of attachments, this submission requires no table of attachments. This submission complies with the 7,000 word limitation found at 40 C.F.R. § 124.19(d)(3). See 40 C.F.R. § 124.19(d)(1)(iv).

- circumvent EPA's procedures for modifying, terminating or revoking and reissuing a UIC permit
- require the Board to make initial scientific findings regarding the similarity of these unrelated wells to the well that is the sole subject of this appeal, with no administrative record or briefing on this issue
- generate significant and perhaps indefinite delay in resolving this matter, given both the time necessary for the Board to consider the similarity of these other wells to the West Bay #22 well and the potential or indeed likelihood of Petitioner continuing to raise challenges to other UIC wells that he deems "identical" to the West Bay #22 well

First, despite being styled as a motion for clarification, the Motion appears to challenge the Haystead #9 Permit and Moore #3-14 Permit on their merits. In this respect the Motion is actually a motion for reconsideration, seeking additional relief clearly absent from the Remand Order. And as with the other unrelated permits that the Petition cited, allowing a challenge to a different permit in the current proceeding would violate the Board's rules for permit appeals at 40 C.F.R. § 124.19. These rules specifically limit review to the "final permit decision" issued by a Region and do not encompass other permits that a petitioner finds to be similar. 40 C.F.R. §§ 124.19(a)(1)-(3). The Haystead #9 and Moore #3-14 Permits are not before the Board, nor are any of the other unrelated permits that Petitioner cited in the Petition. UIC 15-03, Filing #1, pp. 10-11.

Second, the Motion seeks to bypass Petitioner's administrative remedies under the UIC regulations. If Petitioner wished to challenge the Moore #3-14 Permit, then his remedy was to comment on that permit during its public comment period. And Petitioner in fact did this, providing comments on the draft Moore #3-14 Permit before its comment period ended on August 16, 2016. 40 C.F.R. §§ 124.19(a)(2), 124.19(a)(3).

The Board's procedural regulations allow Petitioner to challenge any final decision on the Moore #3-14 Permit, by filing a petition for appeal under 40 C.F.R. § 124.19. The Board's regulations do not allow Petitioner to challenge any draft UIC permit, let alone by shoehorning it into an existing appeal for an unrelated permit via claiming that it is "geologically and factually identical". Regarding "identical" status, Region 5 has not yet issued a final decision or released a final administrative record for the Moore #3-14 Permit.

Petitioner has already appealed the Haystead #9 permit, with that appeal failing in part because the arguments that Petitioner adequately articulated lacked merit. *In re: West Bay Exploration Co.*, 2014 EPA App. LEXIS 35 (EAB Sept. 22, 2014), *Recons. Den. In re: West Bay Exploration Co.*, 2014 EPA App. LEXIS 42 (EAB Oct. 21, 2014). In dismissing Petitioner's challenge to the Haystead #9 Permit, the Board held that "the Region... has provided a well-reasoned and thoroughly-documented explanation for its conclusion that the [USDW] is protected from contamination . . ." and then concluded that it "defers to the Region's technical judgment that the Haystead well will not endanger the [USDW]." *Id.*, 2014 EPA App. LEXIS 35, *27. If Petitioner wishes to challenge the Haystead #9 Permit again, then he must pursue his administrative remedy under the UIC regulations and seek modification, termination, or revocation and reissuance of the Haystead #9 Permit under 40 C.F.R. § 124.5. The Board should not allow Petitioner an end-run around the administrative remedies that Board and UIC regulations specifically provide for these unrelated permits, one of which permits Region 5 has not even finalized yet.

Third, Region 5 notes that the Board cannot grant the Motion regarding these unrelated permits without first making an initial scientific determination regarding the similarity of the West Bay #22 Permit to those permits. Although Petitioner claims – for the first time, in this

Motion -- that such wells are “factually identical” to the West Bay #22 well, there is no underlying administrative record containing EPA’s determinations regarding the factual similarity or dissimilarity of these wells, nor any briefing by the parties on such issues. Indeed, the administrative record for the West Bay #22 Permit is currently remanded for further consideration and the administrative record for the Moore #3-14 Permit will only be completed if and when that permit is finalized.

The Board assessing whether the Haystead #9 and Moore #3-14 wells are “factually identical,” as Petitioner requests, would be inconsistent with the Board’s regulations requiring exhaustion of issues before the permit issuer prior to Board review. 40 CFR 124.19(a)(4)(ii). As the Board noted in an earlier challenge by Mr. Bormuth to the Haystead #9 Permit, “The Region, not the Board, has the technical expertise to grapple with complex scientific questions, such as the geologic argument Mr. Bormuth presents, as a first-line decision-maker. The Board’s role is not to make initial scientific findings but to review the Region’s decisions...” *In re: West Bay Exploration Co.*, 2014 EPA App. LEXIS 35, *19. Bormuth once more asks the Board to decide complex geologic questions – here, the relative similarity of three UIC wells – as a first-line decision-maker, which the Board has clearly indicated is not its role.

Also in stating that the Haystead #9 Permit must fall because the West Bay #22 Permit has fallen, Petitioner misstates the Board’s decision. The Board specifically noted that the Remand Order did *not* mean that it would be inappropriate for the Region 5 to issue an injection permit for the West Bay #22 well. UIC 15-03, Filing #33, p. 18. (“Importantly, the Board emphasizes that it has not concluded that the... West Bay #22 SWD wellsite is inappropriate for the injection of brine. Rather, the Board holds that the Region has not adequately explained how it took into account the record information bearing on this question.”). The Board simply

remanded the permit so that Region 5 will provide a sufficient explanation relating to certain identified aspects of the record. Therefore, in reconsidering the West Bay #22 Permit, the Region may ultimately choose to re-issue that permit with a Response to Comments and administrative record reflecting the Remand Order.

Moreover, not only did the Remand Order not speak to the appropriateness of issuing an injection permit for the proposed West Bay #22 well, it certainly did not address the appropriateness of issuing the Haystead #9 Permit or indicate any intent of the Board to reconsider its earlier decision upholding the Haystead #9 Permit. Permittees must be able to rely on a certain finality when a permit has been issued, appealed and upheld. The fact that the Board remanded the West Bay #22 Permit to address apparent discrepancies in the record relating to that well site does not mean that the entirely separate administrative record for the Haystead #9 Permit – which the Board found to contain a “well-reasoned and thoroughly documented explanation for [Region 5’s] conclusion that the aquifer is protected from contamination” – is now somehow deficient *In re: West Bay Exploration Co.*, 2014 EPA App. LEXIS 35, *27. In fact, as the Board has noted, the determination as to whether there are appropriate confining layers to protect USDWs is by necessity a site-specific one. UIC 15-03, Filing #33, p. 8 (“Our cases emphasize that ‘appropriate geologic data’ means site-specific data”). Therefore, the Board’s finding that Region 5 failed to sufficiently support its conclusions regarding the existence of appropriate confining layers at the West Bay #22 well site does not undermine the Region’s conclusions, upheld by the Board, with respect to confining layers at the Haystead #9 well site.

Fourth and finally, Region 5 notes that the State of Michigan contains over 1,400 Class II UIC wells and that Region 5 continues to receive and process applications for additional Class II

UIC wells in Michigan. If Petitioner can halt this proceeding to challenge additional wells whenever he learns of a new well, as he has now sought to do twice, then he may indefinitely delay resolving this matter. Challenging other wells in this proceeding will necessarily delay its resolution as the Board considers the unique facts of those additional wells. Region 5 requests that the Board prevent further unnecessary delay in reconsidering the West Bay #22 Permit on remand, by denying the Motion and discouraging further such motions regarding permits other than the West Bay #22 Permit.

In closing, because incorporating additional permits and associated arguments into this matter would circumvent the Board's procedures for appealing a UIC permit; would circumvent UIC regulations regarding permit modification, termination, or revocation and reissuance; would put the Board in the position of having to make initial scientific findings; and would generate needless and perhaps indefinite delay in resolving this matter, Region 5 requests that the Board deny the Motion relating to the Haystead #9 and Moore #3-14 permits.

2. Region 5 will address Petitioner's reference to a mining permit on remand, as appropriate

Petitioner asks the Board to require Region 5 to address an argument that a Class III solution mining UIC permit that Region 5 issued for salt caverns in the Greater Detroit, Michigan area proves that any contact with water at depth will dissolve salt formations. To the extent that Petitioner constructed arguments during the public comment period for the West Bay #22 well, he cited the mining permit in support of his argument that water dissolves salt formations. UIC 15-03, Filing #25, attachment 10, pp. 24, 29, 32-33. Petitioner makes the same use of the mining permit in his Petition and his reply brief. UIC 15-03, Filing #1, pp. 7-8; Filing

#29, p. 17. That is, Petitioner's reference supports a larger argument. In addressing Petitioner's argument in the West Bay #22 Permit matter that any contact with water at depth will dissolve salt formations, Region 5 will address the mining permit as appropriate.

3. Petitioner's argument that Region 5's injection pressure calculations are arbitrary is untimely and therefore the Board should deny the Motion regarding this argument

Petitioner asks the Board to require Region 5 to in an unstated fashion better explain Region 5's calculation of permissible maximum injection pressure, alleging that Region 5's decisions regarding maximum injection pressure across multiple UIC permits "seem to have been arbitrarily reached." UIC 15-03, Filing #34, p. 4. For Petitioner's conclusion, the Motion provides no support other than the observation that Region 5 has issued other UIC permits with different maximum injection pressures. UIC 15-03, Filing #34, p. 4. Petitioner has not previously presented this argument to Region 5 or the Board and it therefore does not fall within the scope of the Remand Order.

Petitioner did not present this conclusion in his public comments on the West Bay #22 Permit, or in the Petition. UIC 15-03, Filings #1; #25, attachment 10; and #29. In his reply brief, Petitioner mentioned that a Class III solution mining UIC permit that Region 5 issued for salt caverns in the Greater Detroit, Michigan area has a different maximum injection pressure. Filing #29, p. 9. But Petitioner mentions this only in support of his argument that the Board must consider Petitioner's calculations, which Petitioner claims prove that West Bay #22 injectate will migrate upward. What Petitioner now argues in the Motion has never been before the Board or Region 5. The Remand Order ends the arguments to which Region 5 must respond on remand with Petitioner's reply brief, thus excluding this new argument. UIC 15-03, Filing #

33, p. 23, note 21. Accordingly Region 5 asks the Board to deny the Motion relating to this new argument.

4. Region 5 will address Petitioner's calculations of injectate migration on remand, as appropriate

Petitioner asks the Board to require Region 5 to in an unstated fashion further explain Region 5's determination regarding how far the West Bay #22 injectate may migrate horizontally over a 20 year period, as well as address a two-paragraph abstract of a scientific article that Petitioner attached to his reply brief. Underlying this request, Petitioner appears to actually be arguing that his own calculations prove that the West Bay #22 injectate will migrate further than Region 5's determination states. Petitioner did not raise this argument in his public comments on the West Bay #22 Permit. UIC 15-03, Filing #25, attachment 10. Petitioner does argue for the validity of his own calculations in his Petition, which read with charity may incorporate the argument that he now appears to articulate. UIC 15-03, Filing #1; p. 9. Petitioner more directly attacks Region 5's modeling in his reply brief, also first providing there the two-paragraph abstract that he wishes Region 5 to address. UIC 15-03, Filing #29, pp. 8, B-1. Arguments and evidence appearing in the reply brief fall within the scope of what the Remand Order commands Region 5 to consider upon remand. Accordingly, Region 5 will address Petitioner's calculations and two-paragraph abstract on remand, as appropriate.

5. Region 5 will address Petitioner's argument regarding anhydritic shale swelling on remand, as appropriate

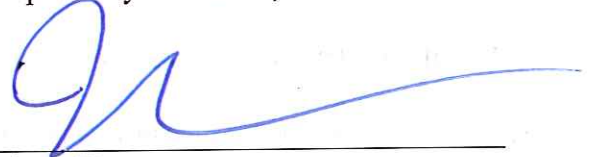
Petitioner asks the Board to require Region 5 to address his argument that anhydritic shales cannot function as a confining layer because "a chemical component influences swelling

behavior.” UIC 15-03, Filing #34, p. 5. Petitioner mentioned a scientific article that appears to underlie this argument during the public comment period, W. Steiner, *Swelling Rock in Tunnels; Rock Characterization, Effect of Horizontal Stresses and Construction Procedures*, Int’l. J. Rock Mechanics and Mining Sci. & Geomechanics Abstracts Vol. 30, No. 4, pp. 361-380 (1993). UIC 15-03, Filing # 19. But beyond simply entering this article into the record, Petitioner did not explain the article’s relevance or in any way construct an argument using it. UIC 15-03, Filing #25, attachment 10, pp. 26-27. Petitioner cited this article again in his Petition, but for an unrelated proposition. UIC 15-03, Filing #1, p. 5. However, Petitioner’s reply brief does contain the argument that he now advances. UIC 15-03, Filing #29, p. 18. Arguments and evidence appearing in the reply brief fall within the scope of what the Remand Order commands Region 5 to consider upon remand. Accordingly, Region 5 will address Petitioner’s argument on remand, as appropriate.

CONCLUSION

The Board should deny that part of Petitioner’s motion seeking to terminate or pre-emptively revoke two unrelated Class II UIC permits as part of this proceeding, for the reasons discussed above. Region 5 also opposes the Motion in part, because Petitioner seeks to have Region 5 address an argument appearing for the first time in the Motion. Regarding the remainder of the relief that the Motion seeks, Region 5 will address Petitioner’s arguments falling within the scope of the Remand Order, as appropriate.

Respectfully submitted,



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Dated: August 19, 2016

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

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In the Matter of:)	
)	
West Bay Exploration Company,)	Appeal No. UIC 15-03
Traverse City, Michigan,)	
West Bay #22 SWD,)	
Permit No. MI-075-2D-0009)	
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CERTIFICATE OF SERVICE

I hereby certify that the original of this **RESPONSE TO PETITIONER'S MOTION FOR CLARIFICATION** in the matter **WEST BAY EXPLORATION COMPANY OF TRAVERSE CITY, MICHIGAN, WEST BAY #22 SWD, PERMIT NO. MI-075-2D-0009, JACKSON COUNTY, MICHIGAN, EAB Appeal No. UIC 15-03**, was filed electronically with the Board.

Further, I hereby certify that one copy of the **RESPONSE TO PETITIONER'S MOTION TO CLARIFICATION** in the matter **WEST BAY EXPLORATION COMPANY OF TRAVERSE CITY, MICHIGAN, WEST BAY #22 SWD, PERMIT NO. MI-075-2D-0009, JACKSON COUNTY, MICHIGAN, EAB Appeal No. UIC 15-03**, was sent to the Petitioner and Permittee, via certified mail, to the following addresses:

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August 19, 2016
Date

