BEFORE THE ENVIRONMENTAL APPEALS BOARD

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C.

In the Matter of:	)	
West Bay Exploration Co. of	)	Permit Appeal No. UIC 14-66
Traverse City, Michigan	)	
Haystead #9 SWD	)	
Permit No. MI-075-2D-0010	)	
Jackson County, Michigan	)	

PETITIONER PETER BORMUTH'S REPLY TO EPA RESPONSE TO MOTION FOR RECONSIDERATION UNDER 40 C.F.R. 124.19(m) OF EAB ORDER DENYING REVIEW AND MOTION TO SUPPLEMENT THE RECORD

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The Petitioner states as follows:

1. It is well-established that a court may reconsider or vacate a prior judgment upon a proper motion for reconsideration. *Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962); *see also Appeal of Sun Pipe Line Co.,* 831 F.2d 22, 24-25 (1st Cir.1987), *cert. denied,* ___ U.S. ___, 108 S.Ct. 2821, 100 L.Ed.2d 922 (1988); *United States v. Eastern Air Lines, Inc.,* 792 F.2d 1560, 1562 (11th Cir.1986); *A.D. Weiss Lithograph Co. v. Illinois Adhesive Products Co.,* 705 F.2d 249, 250 (7th Cir.1983) (per curiam); *Smith v. Hudson,* 600 F.2d 60, 62 (6th Cir.), *cert. dismissed,* 444 U.S. 986, 100 S.Ct. 495, 62 L.Ed.2d 415 (1979); *Sonnenblick-Goldman Corp. v. Nowalk,* 420 F.2d 858, 859 (3d Cir.1970); *American Train Dispatchers Association v. Norfolk and Western Railway Co.,* 627 F.Supp. 941, 949 (N.D.Ind.1985) (citing *Clipper Exxpress*); *Parks v. "Mr. Ford",* 68 F.R. D. 305, 308-09 (E.D.Pa.1975); *American Fam. L. Assur. Co. v. Planned Mktg. Assoc., Inc.,* 389 F.Supp. 1141, 1144 (E.D.Va. 1974).
2. A court may alter or amend a judgment "in three circumstances: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of fact or law or prevent manifest injustice." *Bogart v. Chapell,* 396 F.3d 548, 555 (4th Cir. 2005) (citations and internal quotation marks omitted).

3. The EAB has also ruled that Motions for Reconsideration are generally reserved for cases in which the Board is shown to have made a demonstrable error, such as a mistake of law or fact. *See In re Gary Development Co*, RCRA (3008) Appeal No. 96-2, at 2 (EAB, Sept. 18, 1996). The filing of a motion for reconsideration "...should only be used to bring to the attention of [the Board] clearly erroneous factual or legal conclusions." *In re Southern Timber Products, Inc.*, 3 E.A.D. 880, 889 (JO 1992).

4. The EPA made a clear error of fact in deciding that massive anhydrite at depth will not convert to gypsum and dissolve. The Petitioner provided three different scientific studies that prove massive anhydrite will undergo conversion and several other studies that reference the conversion. The Sass & Burbaum, *ACTA Carsologica* 39/2 Postonjna (2010) – DAMAGE TO THE HISTORIC TOWN OF STAUFEN (GERMANY) CAUSED BY GEOTHERMAL FRILLINGS THROUGH ANHYDRITE-BEARING FORMATIONS shows that massive anhydrite will convert on exposure to water. The Murray article, *Journal of Sedimentary Petrology*, Vol. 34, No. 3 September 1964 – ORIGIN AND DIAGENESIS OF GYPSUM AND ANHYDRITE, shows that anhydrite at a depth of 3500 feet underwent this transformation. The Steiner article, (*International Journal of Rock Mechanics and Mining Sciences & Geomechanics Abstracts*, 30, 4, (1993) – SWELLING ROCK IN TUNNELS) conclusively shows that an anhydrite group at 800 meters deep underwent conversion to gypsum. That is the same approximate depth as the A-1 Salina Group. The EPA made a clear error of fact which demands review.

5. The EAB made a clear error of law. On page 16 of their Order of 9-22-14 the Board determined that they would defer to the Region's technical expertise and experience (See

In re Dominion Energy Brayton Point LLC, 12 EAD 490, 510 (EAB 2006). The Petitioner claims that the Board must apply the "preponderance of the evidence" standard established by 40 C.F.R. § 22.24(b). *See In re The Bullen Cos.*, 9 E.A.D. 620, 632 (EAB 2001); see also *City of Pittsfield, MA v. USEPA*, No. 09-1879 (1st Cir. 2010) holding ***"the substantial evidence standard generally applies to EAB fact-finding."*** The Board cannot defer to the Region's scientific determination because the EPA's position is clearly inaccurate and is contradicted by the scientific studies the Petitioner submitted and by information in the Region's own files regarding the creation of gas storage caverns in Michigan.

6. The Petitioner claims the right to introduce new evidence that was not previously available. See *Sun Pipe Line*, 831 F.2d at 25 (court's discretion includes hearing new material on Rule 59(e) motion); see also *See Publishers Resource, Inc. v. Walker-Davis Publications, Inc.*, 762 F.2d 557, 561 (7th Cir. 1985) (*"Motions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence."*). Permit Number MI-163-3G-A002 issued by Region 5 and the EPA on June 14, 2006 to the Sunoco Inkster Facility clearly shows that Region 5 knows that injection of water will dissolve the Salt layers of the Salina Group. The Petitioner did not have this document available at the time he filed his Petition for Review UIC 14-66 but was provided this document by Ross Michum of the EPA on 8-25-14 in response to the Petitioner's Freedom of Information Act Request #EPA-R5-2014-008546. This new evidence showing could not have been adduced during the pendency of the original motion because the Petitioner was not provided this documentation by the EPA until 8-25-14.

7. The Petitioner claims the Board made a second error of law by not considering all of the scientific studies he submitted with Petition for Review 14-66. The Board has previously determined in *In re Dominion Energy Brayton Point LLC*, 12 EAD 490, 510 (EAB 2007) that: *"the appellate review process can serve as a petitioner's first opportunity to question the validity of material added to the administrative record in response to public comments. In such cases, where a petitioner submits documents in response to new materials added to the record by the Region in response to comments or on remand, and where the Board's task is to review the record and the Region's rationale for its final decision, It seems logical If not necessary that the Board consider the petitioner's proffer of evidence in support of its assertion that the Region's conclusions are erroneous or that the Region erred in failing to take into account such materials. For this reason, among others, we have in the past considered such newly submitted materials in the course of evaluating the merits of a petition."* See, e.g., *In re Metcalf Energy Ctr.*, PSD Appeal Nos. 01-07 & 01-08, at 22 n.13 (EAB Aug. 10, 2001) (Order Denying Review); see also *In re Marine Shale Processors, Inc.*, 5 E.A.D. 751, 797 n.65 (EAB 1995); *In re Three Mountain Power, L.L.C.*, PSD Appeal No. 01-05, at 2-3 (EAB Apr. 25, 2001). In their Order of 9-22-14, the EAB relies on material added to the record by Region 5 in their Response to Comment document, thus the EAB is obliged to consider the technical studies the Petitioner submitted to refute the EPA's erroneous claims. The EAB has ruled that a ***"[P]etitioner may not simply reiterate comments made during the public comment period, but must substantively confront the permit issuer's subsequent explanations."*** *In re Peabody W. Coal Co.*, 12 E.A.D. 22, 33 (EAB 2005). But in their Order of 9-22-14 (Page 12) the EAB claims that the Petitioner ***"has***

saved the full elaboration of his argument and the supporting scientific articles for presentation to the Board in his permit appeal." This is an unjust and circular argument which contradicts the *In re Peabody* ruling. The Petitioner has substantively confronted the permit issuer's subsequent explanations by elaborating his argument and submitting scientific studies to document his position. The EAB puts this pro se Petitioner in an impossible Catch 22, first by requiring a substantive elaboration of argument to confront the permit issuer's subsequent explanations and then by denying the Petitioner such opportunity through refusing to consider the scientific studies he submitted. The Petitioner is not attempting to subvert the UIC permitting process. He was attempting to comply with it.

8. The Petitioner claims that he has been subjected to manifest injustice and his motion for reconsideration must be granted on that basis alone. As the EAB has stated in several previous opinions, *"an unbiased decision maker is an essential element in any meaningful due process hearing, including the administrative permitting process." In re Jett Black, Inc.*, 8 E.A.D. 353, 375 (EAB 1999); *accord In re Marine Shale Processors, Inc.*, 5 E.A.D. 751, 784 (EAB 1995) (citing *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970)). The Petitioner has not received an unbiased decision maker, but rather a decisionmaker determined to issue this permit over all rational and scientifically substantiated objections. The Petitioner has clearly shown show that Region 5 permit writer Timothy Elkins is *"'so psychologically wedded to [his] opinions that [he] would consciously or unconsciously avoid the appearance of having erred or changed position,' and that such opinions 'as a practical or legal matter foreclosed fair and effective consideration' of the evidence presented during*

the permitting process." Marine Shale, 5 E.A.D. at 788 (quoting *Withrow v. Larkin*, 421 U.S. 35, 57-58(1975)); *accord Jett Black*, 8 E.A.D. at 375. While the Petitioner did not have Permit Number MI-163-3G-A002 issued by Region 5 and the EPA on June 14, 2006 to the Sunoco Inkster Facility available at the time he filed his Petition for Review UIC 14-66 until 8-25-14 in response to the Petitioner's Freedom of Information Act Request #EPA-R5-2014-008546, Timothy Elkins had this information in Region 5 files and ignored it and blatantly lied in the EPA Response to Comment document when claiming that the B-Salt and other Salina Groups salt layers would block upward migration of the injected fluid. This is willful and wanton misconduct and the issuance of this permit to West Bay on October 1, 2014 by Tinka Hyde is gross negligence.

9. Finally, the Petitioner argued that the Board must exercise its discretion to review an important policy matter; ie whether these wells constitute a danger to our Michigan aquifers (see 40 C.F.R. § 124.19(a)(4)(B); see also *In re City of Attleboro*, NPDES Appeal No. 08-08, slip op. at 10 (Sept. 15, 2009). The Petitioner has identified 17 wells permitted at similar strata in the lower Michigan basin: WI Permit #30108, #30248, #30123, #36867, #31503, #36958, #30229, #40099 in Calhoun County, Michigan; WI Permit #36629, #42486, #37378 in Macomb County, Michigan; WI Permit #23252, #23701, #23011, #22661 in Saint Clair County, Michigan; and WI Permit #25224, and #20452 in Allegan County, Michigan. The Petitioner's argument that anhydrite converts to gypsum and that both gypsum and salt dissolve in solution, even at depth, clearly demonstrates a potential threat to Michigan's underground aquifers from these wells. The natural vertical gradient in the Michigan Basin will then move the injected brine containing carcinogens upwards.

The potential contamination of our underground sources of drinking water from these wells is an important policy matter which must be addressed by the Board and on this ground alone review should have been granted.

In sum, the Petitioner alleges that the EPA/EAB made two erroneous factual conclusions (massive anhydrite at depth will not convert to gypsum upon exposure to water and the Salina Group will not fracture and dissolve upon contact with injected fluid at 737psi) which demand reconsideration. The Petitioner alleges that the EAB made two errors of law (the Board must apply the "preponderance of the evidence" standard established by 40 C.F.R. § 22.24(b) and the Board must consider all the scientific studies the Petitioner submitted). The Petitioner alleges that he has the right to submit new evidence not previously available to him, Permit Number MI-163-3G-A002 issued by Region 5 and the EPA on June 14, 2006 which clearly demonstrates that Region 5 knows their claims of impenetrability to be erroneous. The Petitioner alleges that the EAB must exercise its discretion to review an important policy matter. And the Petitioner alleges that he has been subjected to manifest injustice due to the bias of Region 5 and the EAB. The desire to protect their prior decisions to issue WI Permit #30108, #30248, #30123, #36867, #31503, #36958, #30229, #40099 in Calhoun County, Michigan; WI Permit #36629, #42486, #37378 in Macomb County, Michigan; WI Permit #23252, #23701, #23011, #22661 in Saint Clair County, Michigan; and WI Permit #25224, and #20452 in Allegan County, Michigan has left them so psychologically wedded to their opinions to foreclose fair and effective consideration of the Petitioner's arguments.

7.

WHEREFORE, for the above stated reasons, the Petitioner, Peter Bormuth, requests reconsideration of the EAB Order issued on 9-22-14.

Respectfully submitted,

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October 10, 2014

CERTIFICATE OF SERVICE

I, Peter Bormuth, do hereby certify that on October 10, 2014, I did send a copy of Petitioner's Reply to EPA Response to Motion for Reconsideration to John P. Steketee, U.S. EPA, 77 West Jackson Blvd (C-14J), Chicago, IL 60604-3590 by regular mail.

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