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 14-03
Traverse City, Michigan	)	
Haystead #9 SWD	)	
Permit No. MI-075-2D-0010	)	
Jackson County, Michigan	)	

PETITIONER PETER BORMUTH'S MOTION FOR RECONSIDERATION UNDER 40 C.F.R. 124.19(m) OF EAB ORDER DENYING REVIEW

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STATEMENT OF COMPLIANCE

I hereby certify that this Motion for Reconsideration contains 2975 words according to the Microsoft Word program used to compose it.

CONCURRENCE

Concurrence with this Motion was sought of EPA Counsel John P. Steketee but was denied by e-mail on 9-29-14.

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INTRODUCTION

Petitioner, Peter Bormuth, proceeding *pro se*, respectfully files this Motion for Reconsideration of the EAB Order Denying Review dated 9-22-14. The Petition involves a UIC permit application for a Class II Oil Waste Disposal Well filed by West Bay Exploration Co. of Traverse City Michigan for the purpose of non-commercial disposal of brine from multiple producing wells. UIC Permit No. MI=075-SD-0010 ("Permit"). At 1 (April 9, 2014) (Administrative Record Index No 171). The well in question is designated Haystead #9 SWD and would be located in Jackson County, Norvell Township, Michigan, near the town of Brooklyn and directly alongside the Raisin River. The Petitioner contends that the Salina Group (Anhydrite & Salt) will not confine the injected brine because the anhydrite will convert to gypsum through a well known chemical process and that both gypsum and salt will dissolve in solution. On page 8 of the 9-22-14 Order, the Region admits that anhydrite can be converted to gypsum by exposure to water but contends anhydrite conversion occurs only near the surface and would not happen at the depth of the Salina Group. The Steiner article, Attachment 21 (*International Journal of Rock Mechanics and Mining Sciences & Geomechanics Abstracts*, 30, 4, (1993) – SWELLING ROCK IN TUNNELS) conclusively shows that anhydrite and anhydrite shales at 800 meters deep underwent swelling (conversion to gypsum). That is the same approximate depth as the A-1 Salina Group. The scientific studies the Petitioner submitted clearly show that the EPA has made an irrational and erroneous conclusion of fact that demands review.

The Petitioner notes that he accepts the EAB determination with regard to his endangered species arguments on behalf of the Indiana bat and the Massasauga Rattlesnake.

GROUNDS FOR MOTION

1. THE EAB HAS FAILED TO APPLY THE APPROPRIATE STANDARD OF REVIEW

2. THE EPA IS SO INSTITUTIONALLY WEDDED TO THEIR OPINION THAT ANHYDRITE WILL NOT TRANSFORM TO GYPSUM AT DEPTH THAT SUCH OPINIONS FORCLOSED FAIR AND EFFECTIVE CONSIDERATION OF EVIDENCE AND THE EAB HAS ABUSED ITS DISCRETION BY REFUSING TO CONSIDER THE SCIENTIFIC STUDIES THE PETITIONER SUBMITTED WITH HIS PETITION FOR REVIEW

RELIEF SOUGHT

1. THE PETITIONER REQUESTS RECONSIDERATION UNDER THE PREPONDERANCE OF EVIDENCE OR SUBSTANTIAL EVIDENCE STANDARD OF HIS ARGUMENT THAT BOTH ANHYDRITE AND SALT WILL DISSOLVE AT THE SPECIFIC DEPTH OF THIS WELL AND THAT INJECTED FLUID WILL THEN MIGRATE UPWARDS.

LEGAL ARGUMENT

1. THE EAB HAS FAILED TO APPLY THE APPROPRIATE STANDARD OF REVIEW

   A. **The Board must apply the preponderance of evidence or substantial evidence standard under 40 C.F.R. § 22.24(b).**

The Petitioner bears the burden of showing the Region's decision to issue UIC Permit No. MI=075-SD-0010 was "based on...[a] finding of fact or conclusion of law that is clearly erroneous." 40 C.F.R. § 124.19(a)(4)(i)(A). The Petitioner argued that the EPA's finding of fact that the Salina Group is impermeable is clearly erroneous because the A-2 Evaporate (anhydrite), the B-Salt and B-Unit, the D-Salt and E-Unit will all dissolve upon contact with the injected 1,200 BWPD of water at a pressure of 737 psi. The Petitioner submitted numerous scientific studies showing that

anhydrite transforms to gypsum upon contact with water and that salt layers dissolve in solution upon contact with water. In 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. The EPA's response to the Petitioner's argument was erroneous, is contradicted by information in their own files, and warrants Board review.

B. The Board must exercise its discretion to review an important policy matter

The Petitioner claims 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.

2. THE EPA IS SO INSTITUTIONALLY WEDDED TO THEIR OPINION THAT ANHYDRITE WILL NOT TRANSFORM TO GYPSUM AT DEPTH BECAUSE OF PREVIOUS UNCHALLANGED PERMITS THEY HAVE ISSUED THAT SUCH OPINIONS FORCLOSED FAIR AND EFFECTIVE CONSIDERATION OF EVIDENCE IN THE TWO CASES THE PETITIONER HAS BROUGHT BEFORE THE EAB. MOREOVER THE EAB HAS PREJUDICIALLY MANIPULATED THE DOCKET AND EVIDENCE IN WAYS DELIBERATELY DETRIMENTAL TO A FAIR CONSIDERATION OF THE PETITIONER'S ARGUMENT

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 EPA/EAB has repeatedly demonstrated bias towards the Petitioner in the two proceedings before the Board on the issue of these injection wells in Jackson County. In the proceeding on West Bay #22 (UIC Permit No. MI-075-2D-0009) Tinka Hyde and the EPA were negligent, abused their discretion, and violated 40 C.F.R. Section 124.13 by filing Sandra K. Yerman's comments on West Bay #22 received by the EPA on June 4, 2012, three days after the comment period closed. The EAB was negligent, abused their discretion, and violated 40 C.F.R. § 124. 19(a)(2) & 40 C.F.R. § 124. 19(a)(3) by filing Sandra K. Yerman's Petition for Review (13-02) dated February 13, 2013.

This action caused substantial prejudice to the Petitioner by denying him his right to a hearing on the issues of material fact he raised in his petition for review and allowed the EPA to escape answering the Petitioner's argument that anhydrite converts to gypsum upon exposure to water, even at depth. Permit writer Anna Miller had done a feeble job in her Response to Comments document and the late filing of Yerman's Petition for Review allowed the EPA withdraw the permit after the allotted time had expired. Tinka Hyde, Director, Water Division, Region 5, EPA abused her discretion and violated 40 C.F.R. § 124.19(j) by issuing a letter of notification of withdrawal on April 8, 2013 without filing a Motion to Withdraw the West Bay UIC Permit No. MI-075-2D-0009 since over 30 days had elapsed since the EPA responded to the Petitioner's Petition for Review (13-01). The EAB abused their discretion and acted in an arbitrary and capricious manner by issuing the April 16, 2013 Order dismissing the Petitioners Petition for Review (13-01) in the West Bay #22 action as moot. The EAB continued to abuse their discretion and act in an arbitrary and capricious manner by issuing the May 29, 2013 Order denying the Petitioner's Motion for Reconsideration under 40 C.F.R. §124.19(m). Specifically on p.4, fn. 4, the EAB ruled that Regions must request a voluntary remand by motion after the *first* 30 day period expires but then failed to apply that ruling to the case in hand. The EAB violated the Petitioner's right to Due Process under the Fifth Amendment, the Administrative Procedure Act, and the *Arccadi* doctrine by failing to follow their own final rules and procedures and denying an administrative hearing and did this deliberately to avoid the argument the Petitioner brought before the Board. The EPA/EAB strategy can be clearly seen. The manipulations of the administrative process in the West Bay #22 (UIC Permit No. MI-075-2D-0009) case allowed the EPA to wipe out a permit hearing in which they were at a distinct disadvantage and gave them

the opportunity begin with a clean slate in the Haystead #9 proceeding. With the extra year this gave the EPA to consider the Petitioner's argument, Permit Writer Timothy Elkins did a superior job to Anna Miller in developing his Response to Comments document. But entire thrust of Mr. Elkins response was to defend the pre-existing EPA position and avoid fair consideration of the Petitioner's argument.

In order to demonstrate bias on the part of the decisionmaker, the Petitioner must show that the decisionmaker was "'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.

The facts in the current case before the Board continue to show bias and a deliberate intent to avoid the Petitioner's full argument. The EAB again abused their discretion by docketing Sandra K. Yerman's untimely Petition for Review UIC 14-67 on 5-14-14 two days past the filing deadline. The EAB again gave *pro se* Petitioner Yerman special privileges, this time ruling that the delay was due to the U.S. Postal Service when obviously the routing delay was due to Yerman's error in addressing the envelope. (see EAB Order Denying Review – 7-3-14). Now the EAB prejudicially manipulates this case by refusing to consider the majority of the scientific studies the Petitioner submitted with Petition for Review UIC 14-66. Specifically the Board has refused to consider attachments 1, 2, 3, 4, 7, 8, 10, 11, 13, 14, 17, 18, 20, 21, 22, 23, & 24. This action deliberately destroys the Petitioner's argument which is based on a sequence of provable facts. The Steiner article, Attachment 21 (*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 scientific studies the Petitioner submitted clearly show that the EPA has made an irrational and erroneous conclusion of fact that demands review. The Board determined that the Petitioner did not submit these studies during the comment period but the Petitioner made his comments orally at the Public hearing on April 30, 2013. Participants were requested to limit their comments to 3 minutes. The Petitioner was actually interrupted by the moderator while making his comments. There was absolutely no way the Petitioner could mention each one of the studies he had researched and give a coherent speech. So the Petitioner used the words "many researchers" and "other studies" and likeminded shorthand. 40 C.F.R. § 124.13 specifically states: *"Commenters shall make supporting materials not already included in the administrative record available to EPA as directed by the Regional Administrator"* and the Petitioner offered to provide Permit Writer Timothy Elkins with the studies. This fulfilled the Petitioner's obligation under 40 C.F.R. § 124.13. The Petitioner made his supporting material available to the EPA. No doubt, Mr. Elkins, being far more familiar with this process than the Petitioner, knew that if he did not accept the hard copy, the EPA could later argue that the Petitioner had not met his burden. The Courts have ruled that permitting authorities have ***"an affirmative duty to inquire into and consider all relevant facts"*** pertaining to the specific statutory and regulatory criteria established for each permit program, and they must ensure they have developed an adequate record upon which to make a reasoned permit decision. (see *Scenic Hudson Pres. Conference v. Fed. Power Comm'n*, 354 F.2d 608, 620 (2d Cir. 1965). The EPA failed to accept the supporting materials the Petitioner cited and the EAB has an

affirmative duty consider all of the scientific studies the Petitioner has submitted and cannot selectively decide which studies the Petitioner referred to in his public comments. The EAB has previously ruled that: *"In reviewing an underground injection well permit application, the Region has a regulatory obligation to consider whether geological conditions may allow the movement of any contaminant to underground sources of drinking water." In re Stonehaven Energy Management*, UTC Appeal No. 12-02 LLC Permit No. PAS2DOIOBVEN (EAB March 28, 2013). The failure of the EAB to consider the Petitioner's supporting materials is not discretionary. The Petitioner argues that the EAB action produces an unjust and absurd consequence: a timely petition that sets forth a legitimate scientific argument on the geological site of the well complete with peer reviewed scientific studies, is rejected because the EPA declined to accept the Petitioner's supporting materials at the Public Hearing. (see *United States v. Meyer*, 808 F. 2d 912, 919 (1st Cir. 1987) holding an unreasonable result is reason to reject an interpretation); see also *Sierra Club v. Train*, 557 F. 2d 485, 490 (5th Cir. 1977) holding, *"...where the result of one interpretation is unreasonable, while the result of another interpretation is logical, the latter should prevail."*). This frankly ludicrous result produced by the EAB interpretation should have been rejected by the Board according to their own administrative case law. (see *In the Matter of Deutsch Co.* 1999 EPA AU LEXIS 117, *11 (EPA ALJ, May 26, 1999) holding, *"...frankly ludicrous results are to be avoided in ascertaining the meaning of statutory or regulatory provisions..."*). The Board is required to ascertain *"whether the approach ultimately adopted by the Region is rational in light of all the information in the record." In re Govt of D.C. Mun. Separate Sewer Sys.*,10 E.A.D. 323, 348 (EAB 2002); *accord Moscow*, 10 E.A.D. at 142; *NE Hub*, 7 E.A.D. at 568. Petitioner's Attachments 1, 2, 3, 4, 7, 8, 10, 11, 13, 14, 17, 18, 20, 21, 22, 23, & 24 are part of the

record and they clearly show that the EPA's approach is not rational, but instead designed to consciously avoid the appearance of having erred. The EAB has done their very best to support the Region in their error and the EAB approach has foreclosed fair and effective consideration of the evidence presented by the Petitioner.

CONCLUSION

WHEREFORE for the forgoing reasons, Petitioner Peter Bormuth respectfully requests that the EAB grant the Petitioners Motion for Reconsideration of the EAB Order Denying Review dated 9-22-14.

Respectfully submitted,

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September 30, 2014

CERTIFICATE OF SERVICE

I, Peter Bormuth, do hereby certify that on September 30, 2014, I did send a copy of Petitioner's 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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Dated: September 30, 2014