# Attachment B-4

**UNITED STATES COURT OF APPEALS**

**FOR THE SIXTH CIRCUIT**

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**PETER BORMUTH,**

CASE No: 13-4411

Petitioner,

**PETITION FOR REVIEW**

v.

**THE ENVIRONMENTAL APPEALS BOARD,**

**TINKA G. HYDE, DIRECTOR, REGION 5**

**WATER DIVISION & THE UNITED STATES**

**ENVIRONMENTAL PROTECTION AGENCY**

Respondents. **PETITIONER'S BRIEF**

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**Peter Bormuth**

**In Pro Per**

142 West Pearl Street

Jackson, Michigan 49201

(517) 787-8097

earthprayer@hotmail.com

**Laurel Bedig**

**United States Department of Justice**

Environmental Defense Section

601 D Street NW, Suite 8000

Washington, DC 20044

(202) 305-0331

laurel.bedig@usdoj.gov

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**CONSTITUTIONAL PROVISIONS**

**Amendment V, United States Constitution** in pertinent part provides:

*"No person shall be deprived of life, liberty, or property, without due process of law."*

## STATUTORY PROVISIONS

**44 U.S.C. Section 1510(a)** in pertinent part provides:

*"the Federal Register [shall contain] complete codifications of the documents of each agency of the Government having general applicability and legal effect, issued or promulgated by the agency by publication in the Federal Register or by filing with the Administrative Committee, and are relied upon by the agency as authority for, or are invoked or used by it in the discharge of, its activities or functions..."*

**5 U.S.C. Section 551(4)** in pertinent part provides:

*"['Rule'] means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or proscribe law or policy or describing the organization, procedure, or practice requirements of an agency."*

**5 U.S.C. Section 702** in pertinent part provides:

*"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."*

**5 U.S.C. Section 704** in pertinent part provides:

*"Agency action made reviewable by statue and final agency action for which there is no other adequate remedy in a court are subject to judicial review."*

**5 U.S.C. Section 706(1)** *in pertinent part provides:*

*"The reviewing court shall compel agency action unlawfully withheld..."*

**5 U.S.C. Section 706(2)(A)(B)(C)(D)(F)** in pertinent parts provide:

*"The reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be – (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C)...short of statutory right; (D) without observance of procedure required by law; (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.*

*In making the forgoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."*

**16 U.S.C. Section 1531(c)(1)** in pertinent part provides:

*"It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of this chapter."*

**16 U.S.C. Section 1536(a)(2)** in pertinent part provides:

*"Each federal agency shall insure that any action authorized, funded, or carried out by such agency...is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or modification of habitat of such species..."*

**40 C.F.R. Section 124.13** in pertinent part provides:

*"All persons, including applicants, who believe any condition of a draft permit is inappropriate or that the Director's tentative decision to deny an application, terminate a permit, or prepare a*

*draft permit is inappropriate, must raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period (including any public hearing) under §124.10."*

**40 C.F.R. Section 124. 19(a)(3)** in pertinent part provides:

*"A petition for review must be filed with the Clerk of the Environmental Appeals Board within 30 days after the Regional Administrator serves notice of the issuance of a RCRA, UIC, NPDES, or PSD final permit decision under § 124.15..."*

**40 C.F.R. Section 124.19(j)** in pertinent part provides:

*"The Regional Administrator, at any time prior to 30 days after the Regional Administrator files its response to the petition for review under paragraph (b) of this section, may, upon notification to the Environmental Appeals Board and any interested parties, withdraw the permit and prepare a new draft permit under § 124.6 addressing the portions so withdrawn."*

**40 C.F.R. Section 144.12(a)** in pertinent part provides:

*"No 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. The applicant for a permit shall have the burden of showing that the requirements of this paragraph are met."*

**SDWA § 1421(a)(3)(A)** provides:

*"The regulations of the Administrator under this section shall permit or provide for consideration of varying geologic, hydrological, or historical conditions in different States and in different areas within a State."*

**SDWA § 1421(a)(3)(C)** provides:

*"Nothing in this section shall be construed to alter or affect the duty to assure that underground sources of drinking water will not be endangered by any underground injection."*

**42 U.S.C. Section 300J–7(b) - (SDWA § 1448(a)(2))** in pertinent part provides:

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

**TREATISES**

Kenneth Culp Davis & Richard J. Pierce, Jr.; *Administrative Law Treatise* (4th ed. 2002)

Harold J. Krent, *Reviewing Agency Action For Inconsistency With Prior Rules and Regulations;* 72 Chi. –Kent L. Rev. 1187 (1996-1997)

Thomas W. Merrill, *The Accardi Principal;* 74 Geo. Wash. L. Rev. 569 (2005-2006)

David A. Straus, *Due Process, Government Inaction, and Private Wrongs*; Sup. Ct. Rev. 53 (1989)

## REQUEST FOR ORAL ARGUMENT

The Petitioner, Peter Bormuth, respectfully requests oral argument pursuant to 6th Cir. R. 34. This Petition for Review involves significant issues involving the EPA's responsibility under the SDWA to assure that underground sources of drinking water will not be endangered by any underground injection and the EPA's responsibility under the ESA to insure that authorization of permits does not harm endangered species. Oral discussion of the facts and the applicable statutes and violated procedural rules would benefit the Court.

## STATEMENT OF JURIDICTION

The Petitioner relies on 42 U.S.C. Section 300-J (SDWA § 1448(a)(2)) for Appellate Court jurisdiction over this case. (*"A petition for review of (2) any other final action of the Administrator under this chapter may be filed in the circuit in which the petitioner resides or transacts business which is directly affected by the action").* The Petitioner resides in the 6th Circuit.

The EAB dismissed the Petitioner's Petition for Review 13-01 by Order on April 16, 2013 and then denied the Petitioner's Motion for Reconsideration in a final Order issued on May 29, 2013. The Petitioner originally filed his complaint pursuant to the Safe Drinking Water Act on June 25, 2013 in D.C. District Court as Civil No. 13-00958. On October 9, 2013 Petitioner filed an amended complaint with the Court. On November 26, 2013 this case was transferred to the 6th Circuit Court of Appeals by Order of Hon. Judge Kentanji Brown-Jackson and docketed as Case No. 13-4411.

## STATEMENT OF ISSUES (GROUNDS FOR REVIEW)

1) The EPA admits other wells in the southern Michigan basin have previously been permitted with the same injection and confining zone of West Bay #22, possibly including but not limited to, 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. Another future well, (Haystead #9) located approximately 3 miles from the site of West Bay #22, is similar in all material respects, endangers the Indiana bat, and is already in the permitting process. The Petitioner contends the EAB violated their regulatory obligation under SDWA § 1421(a)(3)(C) & 40 C.F.R. § 144.12(a) & 16 U.S.C. § 1531(c)(1) & 16 U.S.C. Section 1536(a)(2) by not reviewing the Petitioner's scientific arguments and dismissing his petition as "moot".
2) 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).
3) Tinka Hyde and the EPA were 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 Agency 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.

4) 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) as moot.

5) The EAB abused their discretion and acted 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.

6) Tinka Hyde, the EPA, and 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, failing to provide notice, and denying an administrative hearing.

7) 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.

**STATEMENT OF STANDING**

In determining whether the Petitioner has standing under the zone of interests test to bring his claims, the Court must look to the substantive provisions of the Safe Water Drinking Act (SDWA), the Endangered Species Act (ESA), the Constitution (Fifth Amendment), and the

Administrative Procedure Act (APA), the alleged violations of which serve as the gravamen of Petitioner's complaint. See *Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871 (1990) at 886.

The classic formulation of the zone of interests test is set forth in *Association of Data Processors v. Camp*, 397 U.S. 150 (1970) at 153: *"whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."* Certainly the Petitioner's geological argument is within the zone of interest regulated by the SDWA, Part C, Section 1421 as well as 40 C.F.R. 144.12(a). Clearly the Petitioner's endangered species argument on behalf of the Indiana bat is within the zone of interest regulated by 16 U.S.C. § 1531(c)(1) and 16 U.S.C. Section 1536(a)(2). As a Pagan citizen of the United States, certainly the Petitioner's rights under the Fifth Amendment of the Constitution and under the APA, 5 U.S.C. § 702, 5 U.S.C. § 704, and 5 U.S.C. 706 are fully guaranteed.

In *Friends of the Earth v. Laidlaw Environmental Services*, 528 U.S. 167 (2000) the Supreme Court held that a petitioner need only show *"reasonable concern"* in order to meet the injury-in-fact requirement the Court set in *Association of Data Processors v. Camp*, 397 U.S. 150 (1970). When the Court originally announced the injury in fact test in *ADP,* the Court emphasized in dicta that it would recognize injury to *"aesthetic, conservational and recreational as well as economic values."*

The Petitioner gets his drinking water from an artesian well in Brooklyn's Kiwanis Park on M-50 located less than two miles from the site of West Bay #22 and less than two miles from the site of Haystead #9. The Petitioner is an avid solo canoeist who paddles the Raisin River with

some regularity and claims his right to enjoy this recreational activity would likewise be affected by West Bay #22 and Haystead #9. The Petitioner is also an amateur naturalist who enjoys seeing the Indiana bat in its summer habitat and he claims this imperiled endangered species is located in the immediate vicinity of West Bay #22 and Haystead #9. The Petitioner has standing to proceed.

**STATEMENT OF FACTS**

The Petitioner, Peter Bormuth, proceeding *pro se*, respectfully requests judicial review of the actions of the Environmental Protection Agency, Region 5, Director Tinka Hyde, and the Environmental Appeals Board in dismissing Petition UIC Appeal No. 13-01 (EAB Docket 1, Appendix B) as Moot. The Petition involved 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. The West Bay #22 application proposed the Salina A-2 Evaporite at a depth of 2,634 feet to 2,662 feet as the upper confining zone. West Bay's lithologic description of this 28 foot thick barrier to the potential upward migration of effluent is: "Anhydrite, dense, hard, white, excellent barrier to flow."

In January 2012 Region 5 issued the draft West Bay #22 permit, UIC Permit No. MI-075-2D-0009. The public comment period ran for 30 days from January 30, 2012. The Petitioner did not comment during this period. Region 5 received numerous requests for a public hearing and created a second public comment period running from April 17, 2012 through June 1, 2012. This period included a public meeting at Columbia Central High School on May 23, 2012. The Petitioner provided timely oral comments to Region 5 at the public meeting and expanded on

those comments with timely written comments to Region 5 permit writer Anna Miller via e-mail dated May 29, 2012.

On December 6, 2012, the EPA issued a Response to Comments that superficially addressed the Petitioner's comments regarding Draft Permit No. MI-075-2D-0009 (see Appendix A). The Petitioner received this mailing in a timely fashion.

Region 5 EPA issued the final permit on December 10, 2012, with an effective date of January 9, 2013. Petitioner then filed a timely Petition for Review on January 8, 2013 (see Appendix B). On January 14, 2013, Erica Durr, Clerk of the Board sent a letter to Regional Counsel Robert Kaplan requiring a Response no later than February 26, 2013 (EAB Docket 2). On January 25, 2013 the EPA published final (revised) rule 40 C.F.R. § 124 in the Federal Register with an effective date of March 26, 2013. On February 12, 2013 the Petitioner filed a change of e-mail address with the Board because security on his former e-mail had been breached (EAB Docket 3). On February 13, 2013, 35 days after the effective date of January 9, 2013, the EPA & the EAB allowed Sandra K. Yerman to file a Petition for Review (13-02) (EAB Docket 4). The Petitioner was never notified by Yerman, by the EPA Region 5, or by the EAB that this petition was filed. On February 25, 2013 Region 5 Associate Regional Counsel Kris P. Vezner filed a Response to the Petitioner's Petition (EAB Docket 6, 6.1-6.5) On April 8, 2013 Region 5 Director Tinka Hyde sent the Petitioner a letter of notification of the withdrawal of Permit No. MI-075-2D-0009 (EAB Docket 7, Appendix C). This action was taken under the authority of 40 C.F.R. § 124.19(j), a new subsection replacing 40 C.F.R. § 124.19(d) under the final rule published in the Federal Register by the EPA on January 25, 2013 which went into effect on March 26, 2013. On April 16, 2013

the EAB issued an order Dismissing Petitions 13-01 and 13-02 for Review as Moot (EAB Docket 9, Appendix D). On April 17, 2013 Associate Regional Counsel Kris P. Vezner finally provided the Petitioner with a copy of Yerman's Petition (13-02). On April 23, 2013 the Petitioner filed a Motion for Reconsideration under 40 C.F.R. §124.19(m) (EAB Docket 13, Appendix E). On April 30, 2013 the Petitioner made comments at the public hearing at Columbia Central High School on the permit application by West Bay for a second SWD well in Jackson County, Haystead #9, and added additional comments sent by e-mail to EPA permit writer Timothy Elkins on April 30, 2013 and May 2, 2013 (see Appendix F). On May 7, 2013 Associate Regional Counsel Kris P. Vezner filed a Response to Motions for Reconsideration (EAB Docket 19, 19.01). On May 15, 2013 the Petitioner filed a Reply to the EPA Response under 40 C.F.R. § 124.19(F)(4) (EAB Docket 21, Appendix G). On May 29, 2013 the EAB issued an Order Denying Reconsideration (EAB Docket 22, Appendix H). On June 25, 2013 Petitioner filed a complaint in U.S. District Court for the District of Columbia. Petitioner thereafter filed a motion to transfer the case to the Sixth Circuit Court of Appeals, which was granted on November 26, 2013. The Sixth Circuit docketed this case as Case #13-4411 on December 4, 2013. On January 16, 2014 the EPA filed a Certified Index to the Administrative Record with the Court (Appendix I).

## SUMMARY OF ARGUMENT

The Petitioner claims that a commonly known chemical transformation will allow the upward migration of injected brine into his source of drinking water. The transformation of anhydrite to gypsum through hydration is such a basic and accepted scientific fact that it is taught to college freshman in Geology 101. The Anhydrite conversion process takes place in the presence of

water at temperatures below 104°F. There is no volcanic activity in the Michigan Basin and the temperature 100 feet below the surface is 55°F degrees. There is 1 degree of temperature increase for each 100 feet you descend so a reasonable estimate of the temperature between 2600 and 3100 feet below the surface is 80°F to 85°F degrees. The conversion of anhydrite has been reported at a depth of 3500 feet below the surface. The average pressure gradient in the Michigan basin is 0.43 lb/ft, thus the ambient pressure at these well sites is between 1150 psi and 1333 psi. The solubility of Anhydrite increases sharply with an increase in pressure. Each 0.01Pa increase in pressure results in a 3 to 5 times increase in solubility. Anhydrite rock layers have been observed to swell and increase in volume up to 60% upon exposure to water and when such swelling is prevented due to confining conditions immense swelling pressures from 1.7 up to 4.7 MPa have been monitored and recorded. Scientific studies further show that sodium content accelerates the conversion of anhydrite to gypsum.

The Petitioner claims his Petition for Review is not 'moot'. The harm he sought to mitigate is ongoing in the Michigan Basin since the EPA has permitted other wells at the same geological strata as West Bay #22. A future well, Haystead #9, is already in the permitting process and will affect both Petitioner's drinking water and the Indian bat. Because the EPA withdrew the permit without motion, the Petitioner lacked the opportunity to present plausible arguments before the EAB. The EPA was required by 40 C.F.R. § 124.19(j) to file a motion for voluntary remand after 30 days had expired. The EAB ruled that Regions should not unilaterally withdraw a permit in the future after the 30 day response period has expired, but still allowed Region 5 to do so in this instance. The Petitioner claims the filing of Petition 13-02 was an abuse of discretion which resulted substantial prejudice and that his due process rights under the Fifth

Amendment and the APA were violated. Petitioner asserts that dismissal of Petition 13-01 as 'moot' was abuse of discretion. The Petitioner asserts that the EAB actions have resulted in an absurd and unjust consequence and are a violation of the Accardia Doctrine, since the EPA has violated both substantive regulations (SDWA § 1421(a)(3)(C) & 40 C.F.R. § 144.12(a) & 16 U.S.C. § 1531(c)(1)) rendering its action "not in accordance with law" and procedural regulations (40 C.F.R. § 124.19(a)(3) & 40 C.F.R. § 124.19(j)) creating action "without observance of procedure as required by law." The Petitioner believes Sandra K. Yerman's comments on West Bay #22 were untimely and thus Yerman lacked standing to file a petition for review. Finally the Petitioner claims this Court has the power to set aside the EAB orders and compel a decision on the merits of Petitioner's arguments unlawfully withheld.

## LEGAL ARGUMENT

### I. THE PETITIONER'S PETITION IS NOT 'MOOT'.

#### A. The harm the Petitioner sought to mitigate was not ended by the withdrawal of West Bay #22 because other similar wells are operating.

The EPA stated in their Response to Comment Document dated 12-6-12, Response 34, p.13, (Appendix A) that: *"EPA Region 5 has permitted many wells across Michigan with the same injection and confining zone as the proposed West Bay #22 well."* The Petitioner relies on the Respondent to furnish the Court with a complete list of permitted wells operating at the same injection and confining zone as West Bay #22, but believes that wells permitted at similar strata in the lower Michigan basin include 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.

These wells are operating in violation of 40 C.F.R. Section 144.12(a): *"No 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"* and the Safe Drinking Water Act, Part C, Section 1421(a)(3)(C) which provides: *"Nothing in this section shall be construed to alter or affect the duty to assure that underground sources of drinking water will not be endangered by any underground injection."*

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 EPA to consider the Petitioner's arguments in Petition 13-01 is not discretionary.

The Petitioner notes that the voluntary cessation of allegedly illegal conduct through the EPA withdrawal of West Bay #22 does not deprive this tribunal of power to hear and determine the case, *i.e.,* does not make the case moot. *United States v. Trans-Missouri Freight Ass'n,* 166 U. S. 290 (1897); *Walling v. Helmerich & Payne, Inc.,* 323 U. S. 37 (1944); *Hecht Co. v. Bowles,*

321 U. S. 321 (1944). A controversy remains to be settled in the circumstances despite the withdrawal. See *United States v. Aluminum Co. of America,* 148 F.2d 416, 448 (1945), *e.g.,* a dispute over the legality of the challenged practices; see also *Walling v. Helmerich & Payne, Inc., supra; Carpenters Union v. Labor Board,* 341 U. S. 707 (1951). If this case is moot, the EPA is free to return to their practice of permitting injection wells at inappropriate strata. These injection wells are currently operating, pumping toxic brine into inappropriate geological strata. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion. *United States v. Trans-Missouri Freight Ass'n, supra,* at 166 U. S. 309, 166 U. S. 310. For to say that the case has become moot means that the defendant is entitled to a dismissal as a matter of right, *Labor Board v. General Motors Corp.,* 179 F.2d 221 (1950). The EPA may not moot a claim in this instance simply by withdrawing the permit for the unlawful conduct. Such a ruling encourages the continuation of unlawful conduct following the dismissal of litigation. In *United States v. W.T. Grant Company* 345 U.S. 629 (1953), the Supreme Court held that the voluntary cessation of illegal conduct would moot a case only if the defendant established that ***"there is no reasonable expectation that the wrong will be repeated."*** Unless the defendant meets that "heavy" burden, the court has the power to hear the case and the discretion to grant injunctive relief. (see also *Friends of the Earth v. Laidlaw Environmental Services* and *City of Erie v. Pap's A.M.,* 529 U.S. 277 (2000)). The EPA Region 5, Tinka Hyde & the EAB have not met that heavy burden. The unlawful conduct is ongoing. The EAB should be compelled to render a decision on the geological issues raised by the Petitioner.

**B. The harm the Petitioner sought to mitigate was not ended by the withdrawal of West Bay # 22 because similar future wells are already in the permitting process.**

West Bay Exploration Co. has applied for Permit Number MI-075-2D-0010, Haystead #9 SWD, at a location less than 3 miles from the site of West Bay #22. The geological and surface setting of Haystead #9 SWD is nearly identical to West Bay #22. The Petitioner made comments on Haystead #9 on April 30, 2013 at the public hearing at Columbia Central High School and added additional comments sent by e-mail to EPA permit writer Timothy Elkins on April 30, 2013 and May 2, 2013 (see Appendix F). To date, the EPA has not issued a Response to Comments document. The same Niagaran upper confining zone is used for Haystead #9. This time it is described as an argillaceous carbonate with anhydrite cement. The anhydrite in this carbonate will also dissolve upon contact with water and thus allow for vertical migration of injected fluid through the rock strata. Haystead #9 is located along the Raisin River corridor and actually borders the river (and a small creek). The well site is less than ¼ mile from the river and is prime Indiana bat summer habitat. This is a real well and reproduces every issue of material fact the Petitioner has already put forward in his Petition for Review of West Bay #22.

Under 16 U.S.C. § 1531(c)(1) the EPA must *"...seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of this chapter."* Under 16 U.S.C. Section 1536(a)(2) *"Each federal agency shall insure that any action authorized, funded, or carried out by such agency...is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or modification of habitat of such species..."* The failure of the EPA to consider the Petitioner's arguments in Petition 13-01 is not discretionary.

The Petitioner notes that the EPA withdrawal of UIC Permit No. MI-075-2D-0009 does not deprive this tribunal of power to hear and determine the case, *i.e.,* does not make the case moot. (see *United States v. Trans-Missouri Freight Ass'n,* 166 U. S. 290 (1897); *Walling v. Helmerich & Payne, Inc.,* 323 U. S. 37 (1944); *Hecht Co. v. Bowles,* 321 U. S. 321 (1944)). A controversy over both endangered species and geology remains to be settled in these circumstances. (see *United States v. Aluminum Co. of America,* 148 F.2d 416, 448 (1945), *e.g.,* a dispute over the legality of the challenged practices; see also *Walling v. Helmerich & Payne, Inc., supra; Carpenters Union v. Labor Board,* 341 U. S. 707, 341 U. S. 715 (1951)). The public interest in having the legality of the practices settled militates against a mootness conclusion. (see *United States v. Trans-Missouri Freight Ass'n, supra,* at 166 U. S. 309, 166 U. S. 310). For to say that the case has become moot means that the defendant is entitled to a dismissal as a matter of right, (see *Labor Board v. General Motors Corp.,* 179 F.2d 221 (1950)). A defendant may not moot a claim simply by ceasing the unlawful conduct. A contrary rule would encourage the resumption of unlawful conduct following the dismissal of litigation. In *United States v. W.T. Grant Company,* 345 U.S. 629 (1953) the Supreme Court held that the voluntary cessation of illegal conduct would moot a case only if the defendant established that ***"there is no reasonable expectation that the wrong will be repeated."*** (see also *Friends of the Earth v. Laidlaw Environmental Services* and *City of Erie v. Pap's A.M.*) With the permit application for Haystead #9, the wrong is already being repeated. Clearly there is a public interest in having the legality of the practice settled.

**C. The Petitioner has provided plausible arguments why the EAB should have denied the withdrawal of UIC Permit No. MI-075-2D-0009.**

The Petitioner wishes to address the EAB contention that "neither petitioner provided a single plausible reason why, if the Region had filed a motion for voluntary remand, the Board should have denied it." (*In re West Bay Exploration*, EAB Order May 29, 2013, p.3, Appendix H). The EAB footnote to this text expresses the opinion that the EAB, following the practice of Federal Courts, does not issue advisory opinions on "hypothetical permits" (*In re West Bay Exploration*, EAB Order May 29, 2013, p.3 fn.3 Appendix H).

The Petitioner's Motion for Reconsideration and his Reply to the EPA Response were appropriately concerned with the Constitutional, statutory, and procedural inequities created by the EPA action in withdrawing the permit unilaterally without motion. Had the EPA made the required motion for voluntary remand, the Petitioner would have responded with a brief detailing the underlying issue of material fact: the MDEQ and the EPA are permitting Class II oil waste injection wells at similar strata with similar deficiencies throughout the entire southern Michigan basin. These are not hypothetical permits, but operating wells. A future well, Haystead #9 is already in the permitting process and if permitted will affect the Petitioner's drinking water, his recreational activity, and the Indiana bat. The EAB should be compelled to render a decision on the geological and topographical issues raised by the Petitioner.

**D. The EPA withdrew UIC Permit No. MI-075-2D-0009 without the required motion under 40 C.F.R. § 124.19(j).**

The Petitioner claims that the EPA violated 40 C.F.R. § 124.19(j) by not filing a Motion to Withdraw UIC Permit No. MI-075-2D-0009 since over 30 days had elapsed since the EPA

responded to Petitioner. REVISED RULE 40 CFR 124.19(j) effective March 26, 2013, states: (j) *"Withdrawal of permit or portions of permit by Regional Administrator. The Regional Administrator, at any time prior to 30 days after the Regional Administrator files its response to the petition for review under paragraph (b) of this section, may, upon notification to the Environmental Appeals Board and any interested parties, withdraw the permit and prepare a new draft permit under § 124.6 addressing the portions so withdrawn."*

The Petitioner filed his Petition for Review on January 8, 2013. Region 5 responded on February 25, 2013. Region 5 did not issue their letter of withdrawal until April 8, 2013. **42 days had elapsed.** Once the 30 day period has expired the Regional Administrator must obtain, by motion, a voluntary remand of the permit before withdrawing it. The EPA would be required to give reasons for their withdrawal in such a motion and the opportunity to respond and contest the motion would be available to the Petitioner. No Motion was filed by Region 5, therefore the Petitioner never had the opportunity to make substantive arguments against the withdrawal of the permit.

According to published final rule 40 CFR 124.19(j) the Withdrawal of Permit by the Region 5 Administrator should have been denied by the Environmental Appeals Board. The ends of justice did not require a modification or relaxing of 40 CFR 124.19(j)in this case. Indeed, the 30 day provision was added to the new Final Rules with the deliberate intention to streamline the appeals process and to deny unilateral withdrawal by a Region if they failed to act within 30 days.

The plain and unambiguous language of 40 C.F.R. § 124.19(j) must be applied to this case. (see *Barnhart v. Sigmon Coal, Inc.* 534 U.S. 438, 450 (2002) holding, "the first step in a statutory construction case is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case"). Where the language is plain and unambiguous, the analysis ends, and that plain language must be given effect. (see *Sullivan v. Stroop*, 496 U.S. 478, 482 (1990)).

In their Order of May 29, 2013 denying Reconsideration the EAB states that they have *"granted requests by the Regions for remand of permits in cases even more advanced than the present litigation"* (*In re West Bay Exploration Co.* EAB Order 5-29-13, p.4) but then cites administrative cases that preceded the adoption of the new rules on March 26, 2013. The former rule, 40 C.F.R. § 124.19(d), allowed unilateral withdrawal by the Regions anytime in the proceeding, so this is to be expected.

The Courts have previously held to the established maxim that agencies are required to adhere to their own rules (see *Vitarelli v. Seaton*, 359 U.S. 535, 539, 79 S.Ct. 968, 972, 3 L.Ed.2d 1012 (1959); *Accardi v. Shaughnessy*, 347 U.S. 260 (1954); *Service v. Dulles,* 354 U.S. 363, 77 S.Ct. 1152 1 L.ED.2d 1403 (1957); *Morton v. Ruiz*, 415 U.S. 199 (1974) (holding *"Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures.")* The D.C. Circuit in particular has ruled that this maxim extends to substantive and procedural rules and policies. (see *Lucas v. Hodges*, 730 F.2d 1493 (D.C. Cir 1984) (holding *"It is a familiar principle of federal administrative law that agencies may be bound by their own substantive and procedural rules and policies");* see also *Padula v. Webster*, 822 F.2d 97, 100

(D.C. Cir. 1987); *Doe v. Hampton,* 566 F.2d 265, 281 (D.C. Cir. 1977); *Jolly v. Listerman*, 672 F.2d 935, 940-41 (D.C. Cir. 1982); *Mazaleski v. Treusdell*, 562 F.2d 701, 717 n. 38 (D.C. Cir. 1977); *Air Transport Assoc. v. DOT*, 900 F.2d 369 (D.C. Cir. 1990) (holding rules affecting the right to avail oneself of an administrative adjudication are substantive); *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221, 225 (D.C. Cir. 1959) (holding cutoff dates are binding). These precedents should be followed in this case.

**E. The EAB ruled that Regions should not unilaterally withdraw a permit in the future after the 30 day response period has expired.**

In footnote 4 on p.4 of their 5-29-13 Order the EAB states: *"To avoid any confusion in the future, the Board recommends that the Regions should not unilaterally withdraw a permit after the expiration of the 29-day period following their response to the earliest-filed petition. If a region decides to withdraw the permit after the expiration of that 29-day period but prior to the expiration of the 29-day period applying to later-filed petitions, the Region should first request a voluntary remand of the permit by motion."* (*In re West Bay Exploration Co.* EAB Order 5-29-13, p.4, fn.4, EAB Docket 22, Appendix H, p.90)

This reasonable interpretation of the plain and unambiguous language of 40 C.F.R. § 124.19(j) must be given effect in this case, as well as in future cases. Why doesn't the EAB follow the rule in this case? How can the EAB recommend the EPA follow the published rules in future cases, but still dismiss the Petitioner's petition as moot in this case? This is arbitrary, capricious, an abuse of discretion, and without observance of procedure as required by law. *"[T]here may not be a rule for Monday, another for Tuesday, a rule for general application, but*

*denied outright in a specific case." Mary Carter Paint Co. v. FTC*, 333 F.2d 654, 660 (5th Cir. 1964), *rev'd on other grounds*, 382 U.S. 46 (1965).

**F. Tinka Hyde, the EPA Region 5, & the EAB abused their discretion by filing Yerman's Petition for Review and thus Yerman's petition should be moot.**

The Petitioner claims that Tinka Hyde, the EPA and the EAB abused their discretion and violated 40 C.F.R. § 124. 19(a)(1)(2)(3)(4) by filing Yerman's Petition for Review (13-02) dated February 13, 2013. When determining whether to grant review of petitions filed the Board must first consider whether each petitioner has fulfilled certain threshold procedural requirements including timeliness, standing, and issue preservation. See 40 C.F.R. 124.19(a); *accord In re Circle T Feedlot, Inc.,* NPDES Appeal Nos. 09-02 & 09-03, slip op. at 4 (EAB June 7, 2010), 14 E.A.D.; *In re Avon Custom Mixing Servs.,* 10 E.A.D. 700, 704-08 (EAB 2002).

Specifically, petitions must be filed within thirty days after issuance of the permit. 40 C.F.R. § 124.19(a). The EPA issued the final permit on December 10, 2012, with an effective date of January 9, 2013. Yerman did not file her petition until February 13, 2013, over a full month after the closing date. Failure to file a petition for review by the filing deadline will ordinarily result in dismissal of the petition on timeliness grounds, as the Board strictly construes threshold procedural requirements. (see *In re Town of Marshfield,* NPDES Appeal No. 07-03, at 4 (Mar. 27, 2007) (Order Denying Review); *In re Puma Geothermal Venture,* 9 E.A.D. 243, 273 (EAB 2000).

Region 5 claims that Yerman's untimely petition was filed because "the Region 5 employee assigned to West Bay #22 had been unavailable for over a month and Region 5 employees could not locate several commenters addresses. Through methods including file review and internet

search, Region 5 employees were able to determine addresses for all of the commenters except petitioner Yerman." (EAB Document 19, p.2). The Petitioner questions the veracity of this statement. The EPA had at least two separate documents containing Yerman's address in their files. The Petitioner is not responsible for Region 5's bureaucratic negligence or incompetence. The EPA failed to locate preexisting material in their files. This failure is negligent action by the EPA. This negligence created a violation of the threshold procedural requirements serving to undermine the new regulations which streamline the appeals process and resulted in substantial prejudice to the Petitioner. This is abuse of discretion.

**G. The Petitioner has suffered substantial prejudice due to the filing of Yerman's petition and thus Yerman's petition should be regarded as moot.**

It cannot be denied that the Petitioner suffered substantial prejudice due to the untimely filing of Yerman's petition. Yerman's filing provided Regional Administrator Tinka Hyde with an excuse to withdraw the permit issued by the EPA for the West Bay #22 well without making the required motion for voluntary remand under 40 C.F.R. § 124.19(j), thus depriving the Petitioner of his due process right to a hearing.

The Petitioner notes that while established case law gives the EAB the authority to relax or modify their procedural rules in the interests of justice, it also prevents them from doing so when their action creates substantial prejudice to another party to the proceeding, as in this case. *American Farm Lines v. Black Ball Freight Service,* 397 U.S. 532 (1970) is the most quoted case (*"It is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it. The action of either in such a case is not reviewable* ***except***

***upon a showing of substantial prejudice to the complaining party.***" *American Farm Lines v. Black Ball Freight Service,* 397 U.S. 532, at 539) (bold emphasis added) but it specifically creates an exception for a showing of substantial prejudice.

If substantial prejudice exists, **"an executive agency must be rigorously held to the standards by which it professes its action to be judged."** *See Securities & Exchange Commission v. Chenery Corp.,* 318 U. S. 80 (1943) (bold emphasis added). Since substantial prejudice exists in this case, the EPA and EAB must be rigorously held to the published statutory and procedural standards by which they profess their action to be judged. The EPA action in filing Yerman's petition is reviewable by this Court as a negligent abuse of discretion because of the showing of substantial prejudice to the Petitioner. This adverse agency action has prejudiced and injured the Petitioner's concrete interest in an adequate hearing.

**H. The EAB has violated the Petitioner's right to due process under the Fifth Amendment and the Administrative Procedure Act including right to prior notice and right to a hearing.**

The EAB has violated the Petitioner's right to Due Process. Amendment V, United States Constitution in pertinent part provides: *"No person shall be deprived of life, liberty, or property, without due process of law."* The Fifth Amendment's procedural Due Process Clause places limits on federal administrative agencies adjudicatory (judicial) power.

The Administrative Procedure Act (5 U.S.C.A. §§ 551–706 [Supp. 1993]) governs the practice and proceedings before federal administrative agencies. The Right to Prior Notice is ordinarily a due process requirement. The notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an

opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The Petitioner was never informed by the EPA or the EAB that Yerman's untimely petition was placed on the docket or he would have filed a motion objecting to that action. There was absolutely no notice given to the Petitioner of this untimely and suspect action. This is contrary to the intention of 40 C.F.R. § 124.19(i)(3).

The EPA has used that untimely filing to withdraw their permit under 40 C.F.R. § 124.19(j), depriving the Petitioner of his right to a hearing. Ordinarily, a "hearing" encompasses the right to present evidence and argument. Under the flexible due process standard, however, a "paper hearing" will provide adequate protection of due process protected interests. (see *Hewitt v. Helms*, 459 U.S. 460, 472 (1983)). The EAB's Order of April 16, 2013 is a direct violation of the Petitioner's right to such a paper hearing.

The Petitioner notes that while Due Process does not constrain an agency's choice of decision making procedures when it acts in a legislative manner, i.e., when it makes a policy-based decision that purports to apply to a class of individuals, Due process does limit the agency's choice of procedures when it makes a decision that uniquely affects an individual on grounds that are particularized to the individual such as in this case. (see Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 4.6 at 167 (4th ed. 2002). The Petitioner notes that the failure of an administrative agency to follow its own procedural rules violates the principle that agencies are bound by their own regulations. See David A. Straus, *Due Process, Government Inaction, and Private Wrongs*; Sup. Ct. Rev. 53 (1989) "The language of 5 U.S.C. § 552(a)(2) "strongly suggests" that if an agency does comply with the APA's publication

requirements, the materials identified in APA § 552(a) "may be `relied on, used, or cited as precedent' *against the agency* although they do not serve to bind the public." Strauss, *supra*, at 1467-68 (footnote omitted).

The Supreme Court has held that **"Procedural fairness and regularity are of the indispensable essence of liberty."** *Shaughnessy v. United States ex rel. Mezei,* 345 U.S. 206 at 224 (1953) (bold emphasis added); see also *McNabb v. United States*, 318 U.S. 332 (1943) holding, *"The history of liberty has largely been the history of procedural safeguards."* The Court has stated that *"the most common manner in which the State creates a liberty interest is by establishing 'substantive predicates' to govern official decision-making and, further, by mandating to outcome to be reached upon a finding that the relevant criteria have been met."* *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 462 (1989) (citation omitted) (quoting *Hewitt v. Helms*, 459 U.S. 460, 472 (1983)). Such liberty interests have fallen by the wayside in this case as the EAB orders have been arbitrary, capricious, an abuse of discretion, contrary to constitutional right, short of statutory right, violations of due process, and without observance of procedure as required by law. The Petitioner claims that nothing leaves the EPA with as much room for venality, favoritism, discrimination, error, or carelessness as the power to ignore the applicable rules.

## I. The EAB abused their discretion under the APA by dismissing Petition 13-01 as moot.

The Petitioner claims the EAB abused their discretion by dismissing Petition 13-01 as moot. The Petitioner set forth a legitimate scientific argument on the geological site of the well, complete with peer reviewed scientific studies. The Petitioner's claim that the anhydrite will

transform to gypsum upon contact with water must be addressed by the EAB and cannot be dismissed under 40 C.F.R. § 124.19(j) because the EPA and EAB allowed Yerman to file a late and deficient petition. 40 C.F.R. § 146.62(c)(1)(2) specifically states that the injection zone must have sufficient permeability, porosity, thickness and areal extent to prevent migration of fluids into USDW's and be free of faults and fractures that might allow fluid movement. The EAB has ruled that Regions have *"...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 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 Petitioner claims he has provided the EAB with reasonably trustworthy information and data such that the totality of the facts and circumstances within the Board's knowledge are sufficient to warrant a *firm belief* that migration of hazardous constituents from the injection zone will occur. [referencing 69 Fed. Reg. 15,328, 15,330 (Mar. 25, 2004)]. Moreover in Region 5 Response to Comments document of December 6, 2012 (Certified Index p.12, WB-129, Appendix A, p.4, Response 4 & p.14, Response 34), they admit that the fluid will migrate into the next confining zone that will accept it.

The Petitioner has also shown a strong likelihood that the Indiana bat will be found on the property. 16 U.S.C. § 1531(c)(1) demands that the EPA *"shall seek to conserve endangered*

*species and threatened species and shall utilize their authorities in furtherance of this chapter."* The EAB refusal to address the presence of the Indiana bat is a violation of this statutory requirement.

The Board has abused its discretion in dismissing Petition 13-01 as "moot". The APA provides that reviewable exercises of discretion are reviewed under the "abuse of discretion" standard. Discretion can be abused in many ways. For example, a departure from agency precedent is an abuse of discretion. *"[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored. . . ." Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971); see also *Greyhound Corp. v. ICC*, 551 F.2d 414, 416 (D.C. Cir 1977) (holding, *"This court emphatically requires that administrative agencies adhere to their own precedents or explain any deviations from them."*). In this case the EPA has casually ignored rules, precedents, and statutory requirements.

**J. The EAB action in dismissing Petition 13-01 as moot produces an unjust and absurd consequence.**

The Petitioner argues that the EAB action produces an unjust and absurd consequence: a timely petition that sets forth a legitimate scientific argument on both the geological site of the well and possible harm to endangered species, complete with peer reviewed scientific studies, is dismissed as moot after the 30 day period following response has expired because an untimely petition was filed. (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.")*.

The frankly ludicrous result produced by the EPA's interpretation should have been rejected by the Board according to their own administrative case law. (see *In the Matter of Deutsch Co.* 1999 EPA ALJ 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 dismissal of Appeal No. 13-01 is an arbitrary and capricious abuse of discretion producing a ludicrous result which violates logic, violates the Boards regulatory obligation under statue, is contrary to administrative case law, is unwarranted by the facts, and is without observance required by law. This is prejudicial error and abuse of discretion.

**K. The EPA and EAB's actions are a violation of the Accardi principal.**

Under the *Accardi* principal "any violation by an agency of its own regulations, at least one that results in prejudice to a particular individual, offends due process." (see Thomas W. Merrill, *The Accardi Principal;* 74 Geo. Wash. L. Rev. 569 (2005-2006), p.576). Merrill claims that the definitional provisions of the APA define "rule" in a way that clearly presupposes some rules will have the force of law (Merrill, *The Accardi Principal;* 74 Geo. Wash. L. Rev. 569 (2005-2006), p.595). The cases from which this principle is derived are *Vitarelli v. Seaton*, 359 U.S. 535, 539, 79 S.Ct. 968, 972, 3 L.Ed.2d 1012 (1959); *Accardi v. Shaughnessy*, 347 U.S. 260 (1954); and *Service v. Dulles,* 354 U.S. 363, 77 S.Ct. 1152 1 L.ED.2d 1403 (1957).

The Courts have clearly applied this doctrine to procedures, especially if they have been published in the Federal Register by the agency. (see *Morton v. Ruiz*, 415 U.S. 199 (1974) holding *"Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures."; Lucas v. Hodges*, 730 F.2d 1493 (D.C. Cir 1984) (holding *"It is a familiar principle of federal administrative law that agencies may be bound by their own substantive and*

*procedural rules and policies*"); *Nat'l Conservative Political Action Comm. V. FCC*, 626 F.2d 953 at 959 (D.C. Cir. 1980) holding *"Agencies are under an obligation to follow their own regulations, procedures, and precedents*" and observing the procedural regulations are subject to the *Accardi* doctrine, provided that they are binding.); see also *Vietnam Veterans of Am. v. Sec. of the Navy*, 43 F.2d 528 (D.C. Cir. 1988). In *Nat'l Conservative Political Action Comm. V. FCC*, 626 F.2d 953 (D.C. Cir. 1980) the Court specifically noted that this does not mean such regulations need to be adopted pursuant to notice-and-comment rulemaking procedures, because the APA exempts procedural rules from this requirement.

Publication in the CFR is probative of agency intent because the statue establishing the Code specifies that it shall contain only documents *"having general applicability and legal effect"* (see 44 U.S.C. § 1510; see also *Brock v. Cathedral Bluffs Shale Oil Co.,* 796 F.2d 533, 539 (D.C. Cir. 1986)). In *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221, 225 (D.C. Cir. 1959) the Court held cutoff dates are binding while in *Air Transport Assoc. v. DOT*, 900 F.2d 369 (D.C. Cir. 1990) the Court held rules affecting the right to avail oneself of an administrative adjudication are substantive.

The Petitioner notes that the EPA has violated both substantive regulations (SDWA § 1421(a)(3)(C), 40 C.F.R. Section 144.12(a) & 16 U.S.C. § 1531(c)(1)) rendering its action "not in accordance with law" and procedural regulations (40 C.F.R. § 124.19(a)(3) & 40 C.F.R. § 124.19(j)) creating action "without observance of procedure as required by law." Under modern reasoned decision making or "hard look" norms, departure from nonlegislative rules is subject to review and reversal under the APA and *Accardi* principal, no less than departure from

legislative rules (see *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 41 (1983); see also *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410-14 (1971).

**L. Yerman's comments were received on June 4, 2012, three days after the open comment period closed, and may be untimely.**

40 C.F.R. § 124.13 states: *"All persons,...must raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period."* Federal Rules of Civil Procedure do not apply to the EPA/EAB. The Petitioner does not know why, but the EPA/EAB computes time differently than the Courts. The EPA Practice Manual specifically states that, "If you file a hard copy of your document, in most cases it is not enough to have merely mailed the document by the deadline...it will be considered filed when the Clerk *receives* the document at the EPA/EAB *mailing* address."

The EPA did not receive Yerman's comments until June 4, 2012, three days after the comment period closed (Certified Index p.4, WB-116, Appendix I). Yerman did not make comments during the first open comment period which began on January 20, 2012 and ended on February 20, 2012. Nor did Yerman comment at the Public Meeting held May 23, 2012. Yerman mailed her comments to the EPA on June 1, 2012 through the U.S. Postal Service.

The EPA did not notify Yerman by mail of the second open comment period. Yerman stated she learned of the second public comment period from the public notice published on April 17, 2012 in the Jackson Citizen Patriot. Therefore Yerman did not qualify for the extra three days to be added to the proscribed period (see 40 CFR § 124.20(d): *"Whenever a party or*

*interested person has the right or is required to act within a prescribed period after the service of notice or other paper upon him or her by mail, 3 days shall be added to the prescribed time").*

Since the June 1, 2012 deadline closing the comment period fell on a Friday, Yerman could not be granted a weekend extension by the EPA (see 40 CFR § 124.20(c): *"If the final day of any time period falls on a weekend or legal holiday, the time period shall be extended to the next working day.").*

Given the EPA/EAB method of computing time, the Petitioner believes that Yerman's comments may be regarded as untimely. If so, Yerman had no standing to file a Petition for Review with the EAB and her untimely petition filed February 13, 2013 should never have been accepted. (see 40 C.F.R. Section 124.19 (a)(2) *Who may file? Any person who filed comments on the draft permit or participated in a public hearing on the draft permit may file a petition for review as provided in this section.*) (See also 40 C.F.R. § 124.19(a): *"Any person who failed to file comments or failed to participate in the public hearing on the draft permit may petition for administrative review only to the extent of the changes from the draft to the final permit decision.").* Lack of standing would ordinarily result in dismissal of the petition on timeliness grounds, as the Board strictly construes threshold procedural requirements. (see *In re Town of Marshfield,* NPDES Appeal No. 07-03, at 4 (Mar. 27, 2007) (Order Denying Review); *In re Puma Geothermal Venture,* 9 E.A.D. 243, 273 (EAB 2000).

**II. This Court has the power to set aside the EAB Orders of April 16, 2013 and May 29, 2013 dismissing Petition for Review 13-01 which were arbitrary, capricious, an abuse of discretion, contrary to Constitutional right, short of statutory right, without observance as required by law and unwarranted by the facts.**

The Petitioner observes that this Court has the power to set aside the EAB Orders of April 16, 2013 and May 29, 2013 under the authority of 5 U.S.C. § 706(2)(A)(B)(C)(D)(F).

In legal arguments, I. A through L, the Petitioner argues that agency action in this case was arbitrary, capricious, an abuse of discretion, not in accordance with law, contrary to constitutional right, short of statutory right, without observance of procedure required by law, unwarranted by the facts, and left a dispute over the legality of their permitting practice to be settled. If any one of Petitioners arguments is upheld by this Court, the Court has grounds to set aside the EAB Orders of April 16, 2013 and May 29, 2013 and the Petitioner requests this Court take full and due account of the rule of prejudicial error.

**III. This Court has the power to compel agency action unlawfully withheld.**

This Court has the authority to compel the EAB to issue a ruling on the merits of the Petitioner's Petition for Review filed January 8, 2013 under the authority of 5 U.S.C. § 706(1) (*"The reviewing court shall compel agency action unlawfully withheld..."*) and the Petitioner requests such compelling action. The Petitioner claims that this Court's acceptance of any one of the argument's the Petitioner has made (I. A through L) mandates that the Court compel the EAB to issue a ruling on the merits of the Petitioner's Petition for Review unlawfully withheld.

**RELIEF SOUGHT**

1) The Petitioner seeks Judicial Review of the EPA Region 5 agency action taken by Director Tinka Hyde in allowing the filing of Yerman's Petition for Review (13-02) in direct violation of the language of 40 C.F.R. § 124. 19(a)(3). The Petitioner requests this Honorable Court declare Yerman's Petition for Review "moot" since the filing caused substantial prejudice to the Petitioner.
2) The Petitioner seeks Judicial Review of the EPA Region 5 agency action taken by Director Tinka Hyde in withdrawing Permit No. MI-075-2D-0009 without filing a motion in direct violation of the language of 40 C.F.R. § 124.19(j). The Petitioner requests this case be returned to the EAB for review since the EPA did not follow published regulations.
3) The Petitioner seeks Judicial Review of the EAB Order of April 16, 2013 declaring Petitioner's Petition for Review "moot". The Petitioner requests that his Petition be returned to the EAB for a decision on the merits of his arguments.
4) The Petitioner seeks Judicial Review of the EAB Order of May 29, 2013 denying the Petitioner's Motion for Reconsideration. The Petitioner requests that his Petition be returned to the EAB for a decision on the merits of his arguments.
5) The Petitioner seeks a temporary injunction halting operation of wells in the southern Michigan basin injecting brine into anhydrite bearing strata, potentially including but not limited to, 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 until a decision is reached on the merits of his geological argument.

**CONCLUSION**

WHEREFORE, for the reasons stated herein, the Petitioner respectfully requests this Honorable Court grant judicial review and provide the injunctive and statutory relief requested.

Respectfully submitted,

Dated: March 3, 2014

Peter Bormuth, Petitioner
142 West Pearl Street
Jackson, Michigan 49201
(517) 787-8097
earthprayer@hotmail.com

**STATEMENT OF COMPLAINCE**

I hereby certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). According to the MicroSoft Word program used to compose this brief, it contains 10,666 words.

Peter Bormuth
*In Pro Per*
142 West Pearl St.
Jackson, MI 49201
(517) 787-8097
earthprayer@hotmail.com

March 3, 2014

**CERTIFICATE OF SERVICE**

I, Peter Bormuth, do hereby certify that on March 3, 2014, I sent a copy of Petition for Review, Petitioner's Brief and Appendix to Laurel Bedig, United States Dept. of Justice, Environmental Defense Section, P.O. Box 7611, Washington DC 20044 by regular mail.

Peter Bormuth
*In Pro Per*
142 West Pearl St.
Jackson, MI 49201
(517) 787-8097
earthprayer@hotmail.com

Dated: March 3, 2014

142 West Pearl St.
Jackson, MI 49201

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