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 18-01
Traverse City, Michigan	)	
Haystead #9 SWD	)	
Permit No. MI-075-2D-0010	)	
Jackson County, Michigan	)	

PETITIONER PETER BORMUTH'S REPLY TO EPA REGION 5 RESPONSE TO INFORMAL APPEAL UNDER 40 CFR 124.5(b) and 40 CFR § 144.40(a)(2) & (3)

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The Petitioner has made a practice of inserting the words "Christian scum" into his otherwise rational and considered communications as a deliberate strategy. The Petitioner would like to note that a citizen's First Amendment rights *"are protected against infringement by governments." Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 156, 98S. Ct. 1729, 1733 (1978); *Rendell-Baker v. Kohn*, 457 U.S. 830, 837, 102 S. Ct. 2764, 2769 (1982) (*"it is fundamental that the First Amendment prohibits governmental infringement . . . ."*). The Supreme Court in *Connick v. Myer*, 461 U.S. 138 (1983) held that: *"speech on public issues occupies the highest rung of the hierarchy of first amendment values and is entitled to special protection."* In *San Diego v. Poe*, 543 U.S. 77 (2004) the Court concluded that speech is of public concern when it can be: *"fairly considered as relating to any matter of political, social, or other concern of the community" or when it "is a subject of general interest and of value and concern to the public."* Clearly the Petitioner's concern that Haystead #9 may contaminate our underground sources of drinking water is "a concern of the community." In *Rankin v. McPherson*, 438 U.S. 378 (1987) the Court held that a statement's: *"inappropriate or controversial character...is irrelevant to the question of whether it deals with a matter of public concern."*

The Petitioner began using the term "Christian scum" after the Supreme Court ruled in *Snyder v. Phelps,* (131 S.Ct. 1207 (2011)) that *"...this nation has chosen to protect even hurtful speech on public issues to insure that public debate is not stifled."* That case allowed Christians to picket a soldier's funeral service with signs stating that God killed the soldier as punishment for the toleration of homosexuality in the United States. In *Bible Believers v. Wayne County,* 765 F.3d

578 (6th Cir. 2014)(en banc) the Sixth Circuit allowed Christians with T-shirts and signs saying "Believe in Jesus or die" and "Islam Is A Religion of Blood and Murder" to interrupt the City of Dearborn's Arab International Festival. One Bible Believer carried a severed pig's head on a stick. The Court stressed that the First Amendment *"envelops all manner of speech, even when that speech is loathsome in its intolerance, designed to cause offense, and, as a result of such offense, arouses violent retaliation."*

The Petitioner insists he has the same free speech rights as any Christian citizen to use language designed to cause offense. Hate speech is a powerful political tool, as we just saw in the last election when candidate Donald Trump called Mexicans *"rapists"*, called Syrian refugees *"rabid dogs"*, and called Rosie O'Donnell a *'slob with a fat ugly face"* and won the Presidency. Senator John McCain (R-Ariz.) called Code Pink, the women-led grass roots peace and social justice protestors *"low-life scum"* at a Senate Armed Services Committee hearing. David Agama, Michigan member of the Republican National Committee and chairman of the Top Gun PAC called homosexuals *"scum"* on his website. Texas AG Commissioner Sid Miller called Hillary Clinton a *"cunt"* in an election tweet. Jackson County Sheriff Steve Rand recently referenced a former Black deputy as a *"dumb nigger"* and other Blacks as *"monkeys"* and suggested that *"we should step on their necks like we used to."* Rand made frequent reference to an officer as a *"fag"* and a *"queer."* Referencing a female court employee, Rand stated that *"I always wanted to do a snuff film with her and she could be the star, I would put one in the back of her head as I [ejaculate]."* Rand referred to a local female judge as a *"scatter brained cunt"* and he suggested to a City of Jackson police officer of Hispanic descent: *"don't you have any gardens to go pick?"* *Schuette v. Rand & Jackson County*, 5:18-cv-10497-LJM-SDD at ¶¶ 28, 30. The Petitioner notes

that his First Amendment rights and the legal interpretations of those rights by the Supreme Court of the United States cannot be overthrown by an Administrative Judge from the EAB. This Board cannot ask the Petitioner to behave differently than his political opponents and penalize him for his speech. Pagans believe in "tit for tat" not "love your enemy" or "turn the other cheek" and this Board cannot reject the Petitioner's pleading based on his language.

The Petitioner acknowledges that 40 CFR 124.5(b) does not proscribe a time limit for action by the Region. This problem with the regulation is why the petitioner commenced this action, which needs to be addressed by this Board. It is the Petitioner's contention that the Region's "non-action" has been deliberate and thus can be seen as capricious and abuse of discretion. The Board may grant review of any UIC permit decision if it is based on a clearly erroneous finding of fact or conclusion of law, or involves an important matter of policy or exercise of discretion that warrants review. 40 C.F.R. § 124.19(a). The petitioner is claiming a clearly erroneous finding of fact and an important matter of policy as there are 18 other oil waste injection wells drilled into the same geological strata in the southern Michigan basin. The Board should either terminate this permit or define a time period in which the Region must respond to the petitioner's scientific arguments and evidence.

1. In *In re West Bay Exploration Co*. UIC Appeal No. 13-01 (May 29, 2013) (Order Denying Reconsideration") this Board allowed the region to unilaterally withdraw the permit after the expiration of the 29 day period following their response to the petitioner. The Board upheld this action because christian Sandra Yerman deliberately filed an untimely petition to prevent this Pagan petitioner from having his argument heard. The Board even ruled

that, "[T]o 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" (footnote 4) but did not apply that recommendation to UIC Appeal No. 13-01 to the petitioner's detriment. In that petition, the petitioner made the same arguments he is making today so the Region has essentially had 5 years to formulate a response to the petitioner's arguments.

2. In *In re West Bay Exploration Co.*, UIC Appeal No. 14-66 (October 21, 2014) the petitioner made an error during public comment and did not provide the Region with the scientific studies he cited on appeal. He also went off on a tangent at public comment and did not fully articulate all of his arguments. This Board denied the petitioner's motion to supplement and thus never considered the full implications of his argument and evidence when approving the Haystead #9 permit. The Region's argument that the Board considered, and rejected, the petitioner's argument is demonstrably false. The Board rejected the submitted studies and argument because they had not been properly presented during public comment.[1]

[1] "Although Mr. Bormuth lists eighteen separate articles or documents, he only attempts to tie three of these articles to statements in the Region's response to comments document. !d. at 3, 4. The first of these articles, according to Mr. Bormuth, shows that anhydrite can be quickly converted to gypsum. !d. at 3. But this is the core argument Mr. Bormuth submitted to the Region during the comment period. If he had documentary evidence to support this argument, he should have submitted it at that time. Second, Mr. Bormuth cites to two articles that he claims demonstrate that there is cross-formational flow of fluids in the Coldwater Shale. !d. at 4, 5. However, Mr. Bormuth was well aware that the Region relied on the Coldwater Shale, among other geological strata, as a confining layer. If Mr. Bormuth had documentary evidence disputing the permeability of the Coldwater Shale, he should have included

3. In *In re West Bay Exploration Co*. UIV Appeal No. 15-03 (July 26, 2016) the petitioner was finally free from the deliberate manipulation of christian Sandra Yerman and he also properly presented all his evidence during public comment. This Board concluded that "it is unclear from the administrative record whether Region 5 exercised its considered judgment in evaluating the potential confining layers at the proposed wellsite. The record also does not show that Region 5 duly considered and meaningfully responded to Mr. Bormuth's comments on the potential confining layers. Accordingly, the Board remands the permit." *In re West Bay Exploration Co*. UIV Appeal No. 15-03 (July 26, 2016) (Remand Order).

4. In *In re West Bay Exploration Co*. UIV Appeal No. 15-03 (July 26, 2016) this Board ruled that "Region 5 should consider all of the arguments and scientific materials referenced by Mr. Bormuth in his Reply Brief. Region 5 broadly addressed Mr. Bormuth's public comments for the first time in its Response Brief; therefore, Mr. Bormuth's arguments and scientific materials in his Reply brief constitute fair rebuttal and should be considered on remand to ensure that the Region compiles an adequate record should this matter be appealed again. Cf. *In re Dominion Energy Brayton Point*, LLC, 13 E.A.D. 407, 418" *In re West Bay Exploration Co*. UIV Appeal No. 15-03 (July 26, 2016) (Remand Order) (footnote

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it with his other comments on the Coldwater Shale 5 The articles are dated between 1958 and January 10, 2013, and thus were available to Mr. Bormuth prior to the public comment period on the draft Permit which began on March 27, 2013. U.S. EPA Region 5, Response to Public Comments at 50 (Apr. 9, 2014) (A.R. 68) that he submitted during the public comment period. Finally, Mr. Bormuth argues that a permit the Region issued on June 14, 2006, shows the Region erred in issuing the West Bay permit. !d. at 5-6. Mr. Bormuth claims that he just received a copy of this permit pursuant to a Freedom of lnformation Act request. But Mr. Bormuth provides no justification for why he could not have submitted this 2006 permit during the public comment period on the West Bay permit. Moreover, Mr. Bormuth relies on the 2006 permit to make new arguments (the Region committed "willful and wanton misconduct" and the Region has understated the fracturing the well will cause), and to support an argument made for the first time in his reply brief (the injected brine will dissolve salt layers)." *In re West Bay Exploration Co.*, UIC Appeal No. 14-66 (October 21, 2014) (Order Denying Reconsideration).

21). The Board instructed the Region that "If Region 5 concludes that injected brine at the West Bay #22 SWD wellsite would endanger underground drinking water sources, it should issue a notice of intent to deny the permit under section 124.6(b) and follow the appropriate procedures for a permit denial in part 124. If Region 5 concludes that injected brine at the West Bay #22 SWD wellsite would not endanger underground drinking water sources, Region 5 should supplement the record to (1) provide a site-specific account of the designated confining layers at the West Bay #22 SWD wellsite that is supported by the administrative record; and (2) articulate in a revised Response to Public Comments document a full account of its reasons for rejecting each of Mr. Bormuth's scientific arguments concerning whether the geologic formations at the West Bay #22 SWD wellsite will confine injected brine." *In re West Bay Exploration Co*. UIV Appeal No. 15-03 (July 26, 2016) (Remand Order). Region 5 never acted on this instruction and simply did not reissue the permit to avoid dealing with the petitioner's arguments.

5. In his November 11, 2016 Request for Termination of Permit #MI-075-2d-0010 under CFR § 124.5 the petitioner cited all of the evidence he submitted in the West Bay #22 proceeding and repeated all of the arguments made in that proceeding. The West Bay #22 well and the Haystead #9 well are only four miles apart and the geological strata are virtually identical.
6. Despite having 5 years to review the petitioner's arguments and despite having all of the relevant evidence in their possession since 2015, the Region had still not answered the petitioner's allegations, so on 01/16/2018 the Petitioner filed his Informal Letter of Appeal Under 40 CFR 124.5(b).

7. The petitioner notes that in addition to the West Bay #22 well permit , the Savoy Energy Creque 3 20 Well permit (identical strata and higher injection pressure) was also withdrawn to avoid dealing with the petitioner's arguments.
8. By permitting the following wells at the same geologically inappropriate strata in the lower Michigan basin, 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; WI Permit #25224, and #20452 in Allegan County, Michigan; and Haystead #9 in Jackson County Michigan, the EPA Region 5 is risking the contamination of our underground sources of drinking water and potentially endangering the health of persons. In this Board's Order issued on 08/31/2016 Responding to Motion for Clarification (#36), the petitioner was specifically directed to "pursue his administrative remedy under the UIC regulations and seek modification, termination, or revocation and reissuance of the Haystead #9 Permit under 40 C.F.R. § 124.5." Response to Petitioner's Motion for Clarification at 7."). The Board has ruled petitioner must challenge each one of these wells individually. If the Region is allowed 18 months to respond to each request for termination, the petitioner will be 90 years old before this process is complete and our underground sources of drinking water will be completely contaminated. This is an absurd result.
9. The Haystead #9 well permit was issued on a clearly erroneous factual basis under 40 C.F.R. § 124.19(a)(4)(A) and it's continued operation is not "rational in light of all information in the record." *In re Gov't of D.C. Mun. Separate Storm Sewer Sys.,* 10 E.A.D.

323, 342 (EAB 2002). The Region ignores all the new evidence and argument that was accepted by this Board in the West Bay #22 proceeding.

10. The petitioner is not challenging the mechanical integrity of the well, so the tests that the Region refers to in ¶ 17 and ¶ 20 are meaningless with regard to the petitioner's argument.

11. The Region's argument in ¶ 18 that the geological strata overlaying the Haystead #9 site are capable of confining the injection fluid was successfully challenged by the petitioner in *In re West Bay Exploration Co*. UIV Appeal No. 15-03 (July 26, 2016). The Region keeps referencing the old proceedings where this Board ruled that the petitioner's evidence and argument was not properly presented and thus did not consider the matters raised in the petitioner's Request for Termination of Permit #MI-075-2d-0010 under CFR § 124.5. The remand order in *In re West Bay Exploration Co*. UIV Appeal No. 15-03 (July 26, 2016) changed that reality. The petitioner's arguments and evidence are now a matter of record. It is really the Region which is trying to use old arguments already rejected by this Board.

12. In ¶ 24 the Region lists all of the assignments and intended areas of work in the UIC program. The petitioner acknowledges that each one of these matters is important.

13. EPA Permit #MI-163-3G-A002, issued June 14, 2006 for the Sunoco Inkster Facility in Wayne County shows that the Region knows that injected water will hollow out salt and anhydrite formations. Their inaction on the petitioner's Request for Termination is gross negligence, capricious, and abuse of discretion, given the evidence contained in their own

files. The length of time taken by the Region in this matter constitutes an "effective denial".

CONCLUSION

This Board cannot legally reject the petitioner's informal appeal because of the language the petitioner chooses to use. This Board can, and should, legally determine that the inaction by the Region constitutes an effective denial under 40 CFR 124.5(b), or they should direct the Region to respond within a set time period. Given that the Region has already had 18 months to respond and given that they have had all the relevant evidence in their possession for over 3 years, the petitioner would request that this Board limit that period to 30 days.

Respectfully submitted,

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Dated: February 21, 2018

CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2018 I did mail a copy of PETITIONER PETER BORMUTH'S REPLY TO EPA REGION 5 RESPONSE TO INFORMAL APPEAL UNDER 40 CFR 124.5(b) and 40 CFR § 144.40(a)(2) & (3) to John P. Steketee, U.S. EPA, Region 5, 77 W. Jackson Blvd. (C-14J), Chicago, Illinois 60604-3590 by regular mail with postage prepaid.

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