

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 15-03
Traverse City, Michigan)	
West Bay #22 SWD)	
Permit No. MI-075-2D-0009)	
Jackson County, Michigan)	

PETITIONER PETER BORMUTH’S REPLY TO EPA RESPONSE TO PETITIONER’S MOTION TO SUPPLEMENT

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

TABLE OF AUTHORITIES

Statutes

40 C.F.R. Part 124.19

40 C.F.R. § 124.19(a)(4)(A)

40 C.F.R. § 124.19(a)(4)(B)

40 C.F.R. § 124.19(n)

40 C.F.R. § 146.22

SDWA Part C, § 1421(b)(1)(B)

SDWA Part C, § 1421(b)(3)(A)

SDWA Part C, § 1421(b)(3)(C)

SDWA section 1431

42 U.S.C. §300i

Cases

Colautti v. Franklin, 439 U.S. 379, 392 (1979)

In re Bear Lake Props., 15 E.A.D. 630, 643-44 (EAB 2012)

In re City of Attleboro, NPDES Appeal No. 08-08, slip op. at 10 (Sept. 15, 2009)

In re Env'tl. Disposal Sys., 12 E.A.D. 254, 295 (EAB 2005)

In re Gov't of D.C. Mun. Separate Storm Sewer Sys., 10 E.A.D. 323, 342 (EAB 2002)

In re Stonehaven Energy Management, UTC Appeal No. 12-02 LLC Permit No. PAS2DOIOBVEN (EAB March 28, 2013).

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Counsel for the EPA seems to misunderstand the basis for the Petitioner's Motion to Supplement. The Petitioner's Petition for Review (UIC 15-03) makes two separate claims.

First the Petition claims that UIC Permit No. MI-075-2D-0009 (West Bay #22) was issued on a clearly erroneous factual basis under 40 C.F.R. § 124.19(a)(4)(A) and 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).

Petition UIC 15-03 makes a second claim that under (former) MDEQ administrator Dan Wyatt the Michigan Department of Environmental Quality has been handing out underground injection permits like a child molester handing out candy at a children's playground; that there were permits pending in virtually every county; and that the Petitioner had identified 18 wells currently operating in the southern Michigan basin utilizing the same injection zone and confining layers as the West Bay #22 permit. If this Board grants Petition UIC 15-03 and finds that UIC Permit No. MI-075-2D-0009 (West Bay #22) was issued on a clearly erroneous factual basis then these other wells are also operating in violation of 40 C.F.R. § 144.12(a) and the Safe Drinking Water Act, Part C, § 1421(b)(3)(C). The Petitioner requested that this Board consider these permits under 40 C.F.R. 124.19(a)(4)(B) which allows this Board to exercise discretion on an important policy consideration that the Environmental Appeals Board should review. The Petitioner claims that in the southern Michigan basin the Niagaran cannot be used as an injection zone because the overlaying Salina Group layers will not act as a confining zone due to the chemical reaction of

anhydrite (and Salt) when exposed to water.¹ This is clearly an important policy consideration under 40 C.F.R. 124.19(a)(4)(B). The Petitioner's Motion to Supplement sought to add the Savoy Energy Creque Well Permit No. MI-091-2D-0004 to this list of wells the Petitioner is asking the Board to consider under 40 C.F.R. 124.19(a)(4)(B) since it was issued on April 14, 2016 long after the date Petitioner filed Petition UIC 15-03 and his reply to the Region's response. Under accepted cannons of construction, a rule should be read in a manner that gives effect to all of its parts rather than in a way that renders some of its terms meaningless or redundant. *See Colautti v. Franklin*, 439 U.S. 379, 392 (1979), *overruled in part on other grounds by Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

The Petitioner notes that under 40 C.F.R. 124.19(n) this Board may "do all acts and take all measures necessary for the efficient, fair, and impartial adjudication of issues arising in an appeal under this part..." Both efficiency and fairness dictate that this Board should allow the Petitioner's Motion to Supplement and should consider the potential for contamination the listed 18 wells and the Savoy Energy Creque well may have on our underground sources of drinking water.² While the UIC permitting process "is narrow in its Focus, the Board's review of the UIC permit decisions **extends to the boundaries of the UIC permitting program**, which is limited to the

¹ SDWA Part C, § 1421(b)(3)(A) specifically authorizes that 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.

² The injection pressure of 1998 psi for the Savoy Energy Creque 3 20 Well is 5 times the pressure that the EPA previously determined was safe in Permit #MI-163-3G-A002, issued June 14, 2006 for the Sunoco Inkster Facility in Wayne County. Like all underground injection permits, the Savoy permit prohibits the injection of fluids "at a pressure which initiates fractures in the confining zone" (see 40 C.F.R. § 146.22)

protection of underground sources of drinking water.” *In re Bear Lake Props.*, 15 E.A.D. 630, 643-44 (EAB 2012) (citing cases); *see also In re Env'tl. Disposal Sys.*, 12 E.A.D. 254, 295 (EAB 2005). (bold emphasis added). Consideration of these wells is clearly within the Board's boundary and jurisdiction and the Board may supplement the record with the Savoy well in the interest of fairness and efficiency.

In their March 21, 2016 final report the Flint Water Advisory Taskforce found that the Environmental Protection Agency's "conduct casts doubt on its willingness to aggressively pursue enforcement in the absence of widespread public outrage." (See F-32, p. 52) and the Flint water Advisory Taskforce recommended that the EPA "exercise more vigor, and act more promptly, in addressing compliance violations that endanger public health. (See R-29 p. 8).³

Counsel for Region 5 is requesting that this Board do the same thing EPA Region 5 did during the Flint Water crisis – confine itself to following the minutia of administrative rules rather than addressing an important policy consideration and compliance violation that endangers our [underground sources of] drinking water. The EPA wants this Board to view the West Bay #22 well in isolation. The EPA does not want other wells injecting into the same strata to be impacted by this decision. The EPA's line of reasoning leads to the absurd conclusion that if this Board accepts the Petitioner's geological argument, only the West Bay #22 well permit is withdrawn

³ SDWA section 1431, 42 U.S.C. §300i gives the EPA Administrator broad authority to act to protect the health of persons in situations where there may be an imminent and substantial endangerment. Specifically, section 1431 provides that, upon receipt of information that a contaminant is likely to enter an underground source of drinking water the EPA Administrator may take any action they deem necessary to protect human health.

while other wells in the southern Michigan basin may continue to operate.⁴ The factually identical Haystead #9 well will get to continue to operate because the Petitioner failed to provide the EPA with his scientific studies at the public hearing and this Board declined to allow his motion to supplement. The Savoy Energy Creque 3 20 Well will be allowed to operate despite the fact that the eastern edge of the southern Michigan basin is characterized by a karst geology from past fluid migration which dissolved significant amounts of anhydrite and salt.⁵ They get to utilize an injection pressure of 1998 psi which is 5 times the pressure that the EPA previously determined was safe. This absurdly high injection pressure will easily produce formation fracturing. But the EPA suggests this information has no probative value to the Board? Please.

The EPA asks this Board to be “sensitive to the ills of introducing post-decisional documents into an administrative record.” What about the health of our underground sources of drinking water? The EAB has previously ruled that: “...*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 EPA asks this Board to be “sensitive to delays” when it was the Region that previously withdrew this permit without appropriate motion

⁴ The inefficiency of this process should be obvious to the Board. Township officials will be forced to take legal action to close each individual well if this Board fails to issue a comprehensive decision.

⁵ See *Recent cross formational fluid flow and mixing in the shallow Michigan basin*, GEOLOGICAL SOCIETY OF AMERICA, Bulletin 107 (June 1995) “...regional fractures could have provided pathways for the large volumes of fluids required to dissolve sufficient amounts of halite and anhydrite from the Silurian formations to promote collapse.”

introducing a two year delay into this proceeding. The EPA arguments are perfect examples of administrative arrogance in the absence of widespread public outrage.

In reply, the Petitioner asks this Board to be sensitive to the ills of introducing oil field brines containing human carcinogens into inappropriate geological strata. The Petitioner asks this Board to grant his Motion to Supplement and demands that this Board act with vigor under 40 C.F.R. 124.19(a)(4)(B) in addressing an important policy consideration that impacts our underground sources of drinking water and the public health.

Respectfully submitted,

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

Dated: May 9, 2016

CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2016 I did send a copy of my Reply to EPA Response to Motion to Supplement to Kris Vesner, EPA Region 5, Environmental Protection Agency, 77 West Jackson Boulevard (C-14J), Chicago, IL 60604 and to William Horn, Mika, Meyers, Becket & Jones, 900 Monroe Ave. NW, Grand Rapids, MI 49503 by regular mail.

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