

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

In the Matter of:

**West Bay Exploration Company,
Traverse City, Michigan,
West Bay #22 SWD,
Permit No. MI-075-2D-0009**

Appeal No. UIC 15-03

**RESPONSE TO
PETITIONER'S MOTION TO SUPPLEMENT**

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**RESPONSE TO
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This matter involves Petitioner Peter Bormuth's petition for review of a Class II Underground Injection Control (UIC) permit, Permit No. MI-075-2D-0009 ("West Bay #22 Permit), issued by the U.S. Environmental Protection Agency Region 5 to permittee West Bay Exploration Company under the Safe Drinking Water Act, 42 U.S.C. §§ 300h-300h-8, and under the regulations at 40 C.F.R. Parts 124, 144-148. In his Petition, Petitioner cites a list of Class II UIC wells in Michigan that he claims are similar to the West Bay #22 well and which he asks the Environmental Appeals Board ("Board") to somehow factor into his appeal. UIC 15-03, Filing #1, pp. 10-11. On April 15, 2016, Petitioner filed a Motion to Supplement ("Motion"), purportedly seeking to add an additional Class II UIC permit to this list, specifically the permit for the Savoy Energy Creque 3-20 SWD well, Permit No. MI-091-2D-0004 (Savoy Creque #3-20 Permit). UIC 15-03, Filing # 30; UIC 16-03, Filing #1. Region 5 has until May 3, 2016, to respond to the Motion and responds here. 40 C.F.R. §§ 124.19(f)(3), 124.20(d).¹ Region 5 opposes the Motion, because allowing Petitioner's supplement and associated arguments will impede the efficient, fair and impartial adjudication of the actual issues in this matter, i.e., whether Region 5's issuance of the West Bay #22 Permit was clearly erroneous or otherwise warrants review.

Under 40 C.F.R. § 124.19(n), the 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 . . .

¹ Due to its lack of different sections and lack of attachments, this submission requires neither a table of contents nor a table of attachments. This submission complies with the 7,000 word limitation found at 40 C.F.R. § 124.19(d)(3). See 40 C.F.R. § 124.19(d)(1)(iv).

.” Petitioner’s permit appeal currently before the Board (UIC 15-03) seeks adjudication of whether Region 5’s issuance of the West Bay #22 Permit was clearly erroneous or otherwise warrants review. Incorporating an additional permit and associated arguments into this matter would circumvent the Board’s procedures for appealing a UIC permit; would introduce irrelevant material into this appeal, introducing confusion and inefficiency; and would generate needless and perhaps indefinite delay in resolving this matter.

First, despite being styled as a motion to supplement the record with a single citation, the Motion appears to challenge the Savoy Creque #3-20 Permit on its merits. As with the other unrelated permits that the Petition cites, allowing a challenge to a different permit in the current proceeding would violate the Board’s rules for permit appeals at 40 C.F.R. § 124.19. These rules specifically limit review to the “final permit decision” issued by a Region and do not encompass other permits that a petitioner finds to be similar. 40 C.F.R. §§ 124.19(a)(1)-(3). If Petitioner wished to challenge the Savoy Creque #3-20 Permit, then he should have commented on it during its public comment period and filed a petition challenging its issuance within 30 days of receiving notice of the permit’s issuance. 40 C.F.R. §§ 124.19(a)(2), 124.19(a)(3). Having filed three different appeals with the Board to date, Petitioner has shown that he is aware of these requirements despite his pro se status.

The Motion states that the Savoy Creque #3-20 Permit became effective February 25, 2016. Summerfield Township, Michigan appealed the Savoy Creque #3-20 Permit, in Appeal No. UIC 16-03 filed April 14, 2016. But Petitioner did not appeal the Savoy Creque #3-20 Permit, despite being aware of that permit and filing a Motion regarding that permit a day after Summerfield Township initiated UIC 16-03. Summerfield Township lies in Monroe County, Michigan, within an hour’s drive of Jackson County where Mr. Bormuth lives. UIC 16-03,

Filing #2. Having failed to pursue his administrative remedy against the nearby Savoy Creque #3-20 Permit, Petitioner should not now be able to shoehorn that unrelated permit into this proceeding. Accordingly, Region 5 asks the Board to uphold its procedures for permit appeals and deny the Motion.

Region 5 also notes that trying to evaluate Petitioner's arguments against the Savoy Creque #3-20 Permit, let alone somehow adjudicate those arguments in this matter outside of any proper appeal of that permit, would only confuse and cloud the issues surrounding the West Bay #22 Permit which is the sole subject of this proceeding. Neither the existence of the Savoy Creque #3-20 Permit nor Petitioner's feelings regarding that permit have any probative value regarding the West Bay #22 Permit, which must stand on its own on the strength of its own administrative record. To preserve the integrity of this proceeding, Region 5 asks the Board to deny the Motion on this ground as well.

Finally, Region 5 notes that the State of Michigan contains numerous Class II UIC wells and that Region 5 continues to receive and process applications for additional Class II UIC wells in Michigan. If Petitioner can halt this proceeding to cite additional wells whenever he learns of a new well, then he may indefinitely delay resolving this matter. The additional information that the Motion seeks to introduce has no probative value in this proceeding, but will necessarily delay its resolution as the Board considers the Motion. Region 5 requests that the Board prevent further unnecessary delay by denying the Motion and discouraging further such motions regarding unrelated permits.

The Board is sensitive to the ills of introducing post-decisional documents into an administrative record. In *In re: Town of Newmarket, New Hampshire*, 2013 EPA App. LEXIS 48 (EAB Dec. 2, 2013), *Recons. Den. In re: Town of Newmarket, New Hampshire*, 2014 EPA

App. LEXIS 2 (EAB Jan. 7, 2014), the petitioner in an NPDES permit appeal sought to incorporate into the administrative record documents postdating the permit decision. The EAB held that:

“[c]onsistent with [NPDES permitting regulations] and general principles of administrative law, the Board, like the courts is reluctant to include in an administrative record materials that were not actually before the decisionmaker at the time he or she made the decision that is under review. *Id.*, 2013 EPA App. LEXIS 48 at *128 [citing *In re: Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 516-519 (2006)]

The Board further noted that the postdated materials, like the citation and arguments that Petitioner now offers in this matter, had little significance or were “tangentially relevant at best”; “simply rehash arguments or offer additional opinions about scientific issues that are already covered at great length in the record” and were argumentative and “unhelpful to the resolution of the issues presented in this case.” *Id.*, 2013 EPA App. LEXIS 48 at *130-131. The Board further noted that “to accept new information after the permit is issued “would be to invite unlimited attempts by [petitioners] to reopen and supplement the administrative record after the period for submission of comments has expired.” *Id.*, 2013 EPA App. LEXIS 48 at *134 [citing *In re: Dominion Energy Brayton Point, LLC*, 13 E.A.D. 407, 418 (EAB 2007).] Noting again the repetitiveness and lack of probative value of the proposed supplemental information, the Board declined to allow that supplementation. *Id.*, 2013 EPA App. LEXIS 48 at *134-135.

Like the petitioner in *In re: Newmarket*, Petitioner here offers nothing of probative value, but much that will confuse the issues and delay the resolution of this matter. The proposed citation and associated argument also appear repetitive in light of the unrelated permits that the Petition already cites. Accordingly, Region 5 requests that the Board uphold the integrity of

permit decision-making and the timeliness of its own appellate decision-making by denying the Motion and discouraging further motions regarding post-decisional documents.

In closing, because incorporating an additional permit and associated arguments into this matter would circumvent the Board's procedures for appealing a UIC permit; would introduce irrelevant material into this appeal, introducing confusion and inefficiency; and would generate needless and perhaps indefinite delay in resolving this matter, Region 5 requests that the Board deny the Motion.

Respectfully submitted,



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Dated: May 3, 2016

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

In the Matter of:)
)

West Bay Exploration Company,)
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Permit No. MI-075-2D-0009)
_____)

Appeal No. UIC 15-03

CERTIFICATE OF SERVICE

I hereby certify that the original of this **RESPONSE TO PETITIONER'S MOTION TO SUPPLEMENT** in the matter **WEST BAY EXPLORATION COMPANY OF TRAVERSE CITY, MICHIGAN, WEST BAY #22 SWD, PERMIT NO. MI-075-2D-0009, JACKSON COUNTY, MICHIGAN, EAB Appeal No. UIC 15-03**, was filed electronically with the Board.

Further, I hereby certify that one copy of the **RESPONSE TO PETITIONER'S MOTION TO SUPPLEMENT** in the matter **WEST BAY EXPLORATION COMPANY OF TRAVERSE CITY, MICHIGAN, WEST BAY #22 SWD, PERMIT NO. MI-075-2D-0009, JACKSON COUNTY, MICHIGAN, EAB Appeal No. UIC 15-03**, was sent to the Petitioner and Permittee, via certified mail, to the following addresses:

Peter Bormuth
142 West Pearl Street
Jackson, Michigan 49201

and

Timothy Brock
West Bay Exploration Company
13685 South West Bay Shore Drive, Suite 200
Traverse City, Michigan 49684


Patricia Jeffries-Harwell

May 3, 2016
Date