BEFORE THE ENVIRONMENTAL APPEALS BOARD

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C.

In re West Bay Exploration Company

Traverse City, Michigan

West Bay 22 SWD

Permit No. MI-075-2D-0009

Appeal No. UIC 13-01

PETITIONER'S REPLY UNDER 40 C.F.R. 124.19(F)(4)TO EPA RESPONSE TO PETITIONERS MOTION FOR RECONSIDERATION OF EAB ORDER DISMISSING PETITION FOR REVIEW AS MOOT

Peter Bormuth – Petitioner

In Pro Per

142 West Pearl St.

Jackson, MI 40201

(517-787-8097)

earthprayer@hotmail.com

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Cited Authorities

Page

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."

Amendment I, United States Constitution in pertinent part provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free

exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

TREATISES

Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* (3d ed. 1994)

Joshua I. Schwartz, *The Irresistible Force Meets the Immovable Object: Estoppel Remedies for an Agency's Violation of Its Own Regulations or Other Misconduct*, 44 Admin. L. Rev. 653 (1992)

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

TABLE OF ATTACHMENTS

Appendix A: Petitioner's Letter to Yerman dated 4-21-13

Appendix B: Certified Mail Receipt No. 7012 1010 0000 8694 4012

Appendix C: Petitioner's e-mail to William Horn, attorney for West Bay, dated 4-27-13

STATEMENT OF COMPLIANCE

The Petitioner certifies that his Reply to EPA Response to Petitioner's Motion To Reconsider contains 3,371 words according to the Microsoft Word program used to compose it.

PETITIONER'S REPLY UNDER 124.19(f)(4) TO EPA RESPONSE TO PETITIONERS MOTION FOR RECONSIDERATION OF EAB ORDER DISMISSING PETITION FOR REVIEW AS MOOT

Legal Argument

The Petitioner will first address EPA Associate Regional Counsel Vezner's procedural arguments. Vezner claims the Petitioner did not make appropriate contact with other parties before filing motions. Petitioner notes that he contacted Mr. Vezner before filing his April 19, 2013 and April 23, 2013 motions. Petitioner also personally spoke with Sandra Yerman on April 21, 2013 (see Attachment A & B) and informed her he would be filing a Motion to Reconsider. Yerman neither concurred nor objected to Petitioner's notice of filing. Petitioner notes that Yerman also informed the Petitioner that she would be filing a Motion to Stay and a Motion for Clarification and the Petitioner neither concurred nor objected to her filings. Petitioner notes that while the untimely filing of Yerman's petition created substantial prejudice to the Petitioner and he actively seeks its removal from the docket, he believes Yerman has every right to defend her petition, make motions, and demand a response from the EPA. Finally Petitioner notes his petition challenges the EPA action in approving this permit, not West Bay's action in applying for it. The EPA is the party to this proceeding. No attorney from West Bay has filed an appearance in this hearing. Petitioner is not obligated to seek concurrence from a party that has not made an appearance but out of courtesy did contact West Bay attorney William Horn by e-mail on April 27, 2013 (see Attachment C) to inform him of the motions and to provide him with a copy. The EPA's argument based on procedural requirements fails.

The Petitioner made the following seven arguments for reconsideration: First, the EPA violated 40 C.F.R. § 124.19(j) by not filing a Motion since over 30 days had elapsed since the EPA responded to Petitioner; Second, the EPA and the EAB violated 40 C.F.R. § 124. 19(a) by filing Sandra K. Yerman's Petition For Review (13-02) dated February 13, 2013; Third, the EAB abused their discretion under 40 C.F.R. § 124.19(a)(4)(i)(A)(B) by filing Sandra K. Yerman's Petition; Fourth the EAB abused their discretion by dismissing Petitioner's Petition as moot; Fifth, the EAB violated Petitioner's right to Due Process under the Fifth Amendment; Sixth, the EAB violated Petitioner's right to Administrative Due Process; Seventh, the EAB discriminated against the Petitioner under the First Amendment.

The EPA's contention that they had the right to unilaterally withdraw West Bay #22 permit violates both the plain language and intent of the new regulations. 40 C.F.R. § 124.19(j) unambiguously states: *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 on January 8, 2013. Region 5 responded on February 25, 2013. On April 8, 2013 Region 5 unilaterally withdrew the West Bay 22 permit. Since Region 5 took this action over 30 days since they responded to petitioner, Vezner was required to file a motion to withdraw for Region 5, which he did not do. 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)). 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)). Vezner's claim that that 40 C.F.R. § 124.19(j) authorized Region 5 to unilaterally withdraw the permit is absurd.

In its summary of the rule changes the EPA specifically states that: "The changes to the rule clarify to practitioners that substantive briefing must be submitted at the outset of the appeal and that one substantive review will occur." This desire to streamline the appeal process is again given as the reason for the rule changes in the Background section of the preamble. "As such, these provisions are being revised to reflect the clarification that all substantive briefing occurs at the outset of the appeal. Specifically, before today, § 124.19 authorized the Regional Administrator to unilaterally withdraw a permit and prepare a new draft permit at any time prior to the Board's grant of review under what was § 124.19(c). The provision served to prevent unilateral withdrawal of a permit by the Region after the Environmental Appeals Board had begun substantive consideration of an appeal. **This rule revises § 124.19 to allow the Regional Administrator to unilaterally withdraw the permit at any time prior to 30 days after the Regional Administrator files its response to the petition under paragraph (b) of this section.** This revision will continue to ensure that unilateral withdrawal of a permit will occur before the Board has devoted significant resources to the substantive consideration of an appeal." Given that 6 weeks had elapsed since Region 5 responded to the Petitioner there is a strong likelihood that a substantive consideration of the petitioner's appeal had begun or already taken place. In examining the context of a regulation "the Board looks first to the plain meaning of the regulatory text, then considers the regulations as a whole, the regulatory history, and the agency's post-promulgation guidance documents on the topic." *In re San Pedro*

Forklift, slip op. at 26 (citing *In re Clarksburg Casket Co.*, 8 E.A.D. 496, 502-504 (EAB 1999)). Analogizing from the rules of statutory construction, the words of a regulation must be read in their context and with a view to their place in the regulation's overall scheme. *In re Deseret Power Electric Cooperative*, PSD Appeal No. 07-03, slip op. at 32 (EAB Nov. 13, 2008) 14 E.A.D. (citing *Davis v. Michigan Dep't. of Treasury*, 489 U.S. 803, 809 (1989)). The overall regulatory scheme clearly contemplates that once the EPA has responded to a petition and 30 days have elapsed, they must move by motion to withdraw their permit. Indeed, § 124.19(j) was specifically created to replace § 124.19(c) in order to prevent the EPA from acting unilaterally after 30 days. Vezner's argument contradicts the plain language, intent, and context of the new regulations.

The overall regulatory scheme also clearly contemplates that while multiple petitions for review may be filed at different times, all petitions for review will be filed by the deadline. 40 C.F.R. § 124.19(a)(3) states in clear and unambiguous language that: "*Filing deadline.* 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 or a decision to deny a permit for the active life of a RCRA hazardous waste management facility or unit under § 270.29 of this chapter. A petition is filed when it is received by the Clerk of the Environmental Appeals Board at the address specified for the appropriate method of delivery as provided in paragraph (i)(2) of this section." The final permit decision was issued on December 6, 2012 with an effective date of January 9, 2013. 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." Petitioner questions the legitimacy and the veracity of this statement. First, the Petitioner who has suffered substantial prejudice and irreparable harm is not responsible for Region 5's bureaucratic negligence. If an employee was ill or on leave for over a month then someone else should have been assigned to the task. Second, the EPA had two addresses for Yerman from previous filings and FOIA requests: a Post Office Box in Brooklyn, Michigan (possibly outdated) and her current address. The EPA, either deliberately or through negligent incompetence, failed to locate preexisting material in their own files resulting in substantial prejudice to this petitioner. This negligent action by the EPA created a violation of the threshold procedural requirements serving to undermine the new regulations which seek to streamline the appeals process.

The Petitioner argues that the acceptance of Vezner's arguments 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 must be rejected by the Board. (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 a ludicrous result which violates logic, violates the Boards regulatory obligation, and violates the Petitioner's due process rights.

The Petitioner notes that the Board's regulatory obligation requires it to review the geological argument he has raised. "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). 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 USDWs" and be free of faults and fractures that might allow fluid movement. 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 Board has failed its regulatory obligation and abused its discretion in dismissing SIC 13-01.

The EAB has also 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 (5U.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 late 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 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. (see Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 4.6 at 167 (3d ed. 1994). 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. *Vitarilli v. Seaton*, 359 U.S. 535, 547 (1959); *see also Service*

v. Dulles, 354 U.S. 363 (1957); *see generally* Joshua I. Schwartz, *The Irresistible Force Meets the Immovable Object: Estoppel Remedies for an Agency's Violation of Its Own Regulations or Other Misconduct*, 44 Admin. L. Rev. 653, 678-86 (1992); see also 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). While the EAB can claim the authority to relax or modify their procedural rules in the interests of justice, they cannot do so when their action creates substantial prejudice and irreparable harm to another party to the proceeding as in this 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, 539 (1970). 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). Substantial prejudice exists in this case since the decision to allow Yerman to file a late and deficient petition has caused irreparable harm to the Petitioner who has seen his petition and due process rights disappear as "moot" without notification and without a hearing. The EPA's response never addresses this issue of substantial prejudice. Vezner's argument should be rejected on due process grounds alone.

The Petitioner claims religious prejudice. In an Order issued January 17, 2013, District Court Judge Hon. Robert H. Cleland declared the Petitioner a public figure (see *Bormuth v. City of Jackson et al*, ED Mich. Civil No. 12-11235). Because of his public speech, there is a known enmity between the Petitioner and Christians in the Brooklyn area. Since his discovery on April 17, 2013 that Petitioner Yerman's untimely filing was placed on the docket, the Petitioner has spoken to several individuals who claim that Yerman acted to "force you [Peter B] to work with Christians and share the accomplishment or to destroy your pleading." While this is hearsay, the Petitioner finds it perfectly in keeping with the mentality of his Christian opponents. The EPA claims ignorance of Yerman's religious beliefs but they are well aware of the Petitioner's beliefs. The Petitioner questions why the EPA conveniently could not find Yerman's address during their review of files and notes that this negligent action has led to a deliberately prejudicial outcome for a Pagan citizen who was similarly situated to a Christian in all significant material respects until the EPA allowed her special privileges.

CONCLUSION

WHEREFORE the Petitioner respectfully requests that the EAB vacate its Order of April 16, 2013 dismissing Petition UIC Appeal No. 13-01 as Moot; deny Withdrawal of the Permit by Region 5 Administrator, Tinka Hyde; address the issues of material fact presented for review in Petition 13-01; and dismiss Petition 13-02 from the docket.

Respectfully submitted,

Peter Bormuth

142 West Pearl St.

Jackson, MI 49201

(517) 787-8097

earthprayer@hotmail.com

Dated: May 15th, 2013

10.

CERTIFICATE OF SERVICE

I hereby certify that on May 15th, 2013, I mailed a copy of my Reply to EPA Response to Petitioner's Motion to Reconsider to Kris P. Vezner, Associate Regional Counsel, U.S. EPA, Region 5, 77 W. Jackson Blvd. (C-14J), Chicago, IL 60604; to William Horn, Mika Meyers Becket & Jones, 900 Monroe Ave. NW, Grand Rapids, MI 49503; and to Sandra K. Yerman, 6600 Riverside, Brooklyn, MI 49230 by regular mail.

By: Peter Bormuth

In Pro Per

142 West Pearl Street

Jackson, MI 49201

(517) 787-8097

earthprayer@hotmail.com

Dated May 15th, 2013

Attachment A

4-21-13

Dear Ms. Yerman

I just wanted to summarize the conversation I had with you this evening around 6:30 pm while standing in your driveway speaking to you through the window in your house while looking at the discarded skeleton of your Christmas tree and smelling the odor of dog shit and cat litter drifting from your porch.

I strongly suggested that you speak with an attorney about your civil rights in this matter before the EAB. I expressed my doubts that the ACLU would be interested in your case, since they have turned me down in two other cases. Please try them anyway. They support Christians so they may help you if they think you have a case.

We spoke about the EAB's obligation to hear your petition and the EPA's obligation to respond to it. I noted that I am not an attorney and cannot give anyone legal advice but expressed my opinion that the EAB regulations enacted March 26, 2013 require the EPA to make a motion to withdraw a permit ONLY if 30 days have elapsed since they responded to a petition. Because they never responded to the petition you filed on February 13, 2013, I believe they can inform you that they are withdrawing the permit simply by sending you a letter of notification. You might ask an attorney if they were required to respond to your petition before April 8, 2013. In my case, since they responded to my petition, and 30 days had elapsed since they responded, they are required to file a motion with the EAB, which they did not do.

I informed you that I had filed a Motion to Deny and would be filing a Motion to Reconsider. I had already received your Motion to Reconsider (which is why I came to speak with you) and you informed me that you would also be filing a Motion to Stay and a Motion for Clarification.

I expressed my regret that you did not send me a copy of your petition when you filed it on February 13, 2013 so long after the deadline had expired. As a party to this pleading, I had never been served notice of your filing. Not by you, not by the EPA, and not by the EAB. I did not even know there was another petitioner in this case until I received the April 8, 2013 letter from the EPA announcing their withdrawal of the permit. On April 17, 2013, EPA Regional Counsel Kris Vezner finally provided me with a copy of your petition.

Finally I expressed my frustration that your filing has been used by the EPA to deny my right to have my legitimate issues of material fact determined by the EAB under their statutory regulations. And then I departed.

In closing, I once again encourage you contact an attorney.

Sincerely,

Peter Bormuth

JACKSON MPO
JACKSON, Michigan
492011386
2524950627-0095
04/22/2013 (517)789-2411 07:39:01 AM

Sales Receipt

Product Description	Sale Unit Qty	Price	Final Price
BROOKLYN MI 49230			$0.46
Zone-1 First-Class Letter			
0.70 oz.			
Expected Delivery: Tue 04/23/13			
## Certified			$3.10
Label #:	70121010000086944012		
Issue PVI:			$3.56
Total:			$3.56

Paid by:
Cash $4.06
Change Due: -$0.50

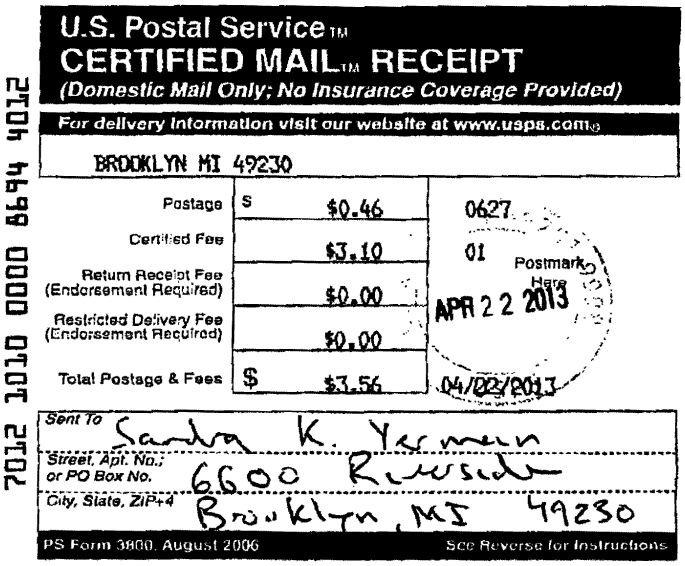
For tracking or inquiries go to USPS.com or call 1-800-222-1811.

Order stamps at usps.com/shop or call 1-800-Stamp24. Go to usps.com/clicknship to print shipping labels with postage. For other information call 1-800-ASK-USPS.

****
****
Get your mail when and where you want it with a secure Post Office Box. Sign up for a box online at usps.com/poboxes.
****
****

Bill#:1000502589731
Clerk:01

All sales final on stamps and postage
Refunds for guaranteed services only
Thank you for your business
****



New Reply Delete Archive Move to Categories peter

Search email

Folders

Inbox 12

Junk 2

Drafts

Sent

Deleted

New folder

Quick views

Documents 4

Flagged

Photos 1

Shipping updates

New category

RE: State Appeals cases?

To see messages related to this one, group messages by conversation.

peter bormuth (earthprayer@hotmail.com)
To: william horn

1 attachment (424.8 KB) Outlook Active View

motion_for_reconsi...

Download

Download as zip

Mr. Horn

I also filed this Motion for Reconsideration with the EAB. Since you have not made an appearance in that administrative hearing, i do not think i am required to serve you, but wish to provide you with a copy out of courtesy.

Peter Bormuth

Subject: RE: State Appeals cases?
Date: Fri, 26 Apr 2013 15:31:34 -0400
From: WHorn@mmbjlaw.com
To: earthprayer@hotmail.com

http://courts.mi.gov/Pages/default.aspx

peter

Content fr
Learn mor