

**Before The Environmental Appeals Board  
United States Environmental Protection Agency  
Washington, D.C.**

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In re:	)	
	)	
Bear Lake Properties, LLC	)	UIC Appeal No. 11-03
	)	
Permit Nos.: PAS2D215BWAR	)	
PAS2D216BWAR	)	
	)	

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**Petitioner’s Motion For Partial Reconsideration**

On June 28, 2012, this Honorable Board (“Board”) issued in the above-captioned matter an Order Denying Review In Part And Remanding In Part (“Order”) that concerns two proposed underground injection control wells in Columbus Township, Warren County, Pennsylvania. Pursuant to 40 C.F.R. § 124.19(g), Petitioner Mr. William A. Peiffer, Jr., by his undersigned counsel, hereby moves the Board to reconsider its Order insofar as it pertains to the analysis and conclusions from § V.D. of the Order. Specifically, the Board committed an error of law when it held that population is not a factor to be considered in the UIC permitting process, and an error of fact when it determined that Petitioner had not taken issue with the area of review formulation.

Pursuant to practice before the Board as outlined in its Practice Manual, on Friday, July 6, 2012, counsel for Petitioner phoned counsel for the Agency to obtain the Agency's position on this motion. Ms. Nina Rivera, counsel of record for the Agency, stated that the Agency did not oppose the actual filing of the motion but that its position on the motion itself would not be known until after the Agency reviewed it.

In support of this motion, the Petitioner avers the following:

**I. Factual background**

On October 29, 2010, Bear Lake Properties, LLC (“Permittee”) submitted applications to Region 3 of the United States Environmental Protection Agency (“Agency”) for two Class IID Underground Injection Control (“UIC”) well permits for the Bittinger #1 and Bittinger #4 wells. Thereafter, on January 21, 2011, EPA published a Notice of Proposal to issue the Bear Lake permits, and set a February 23, 2011 deadline to receive public comments on the proposed permits pursuant to 40 C.F.R. § 124.10. To accommodate substantial community interest in the proposed permits, EPA convened a public hearing in Columbus Township on March 23, 2011, and extended the public comment period to March 30, 2011. Petitioner William A. Peiffer, Jr., a resident of Corry, Pennsylvania, and a member of the Brokenstraw Watershed Council, submitted a timely written comment to EPA on the proposed permits and appeared at the March 23, 2011 public hearing in Columbus Township.

On June 8, 2011, EPA issued final permits PAS2D215BWAR and PAS2D216BWAR for Bittinger #1 and Bittinger #4 respectively. On July 8, 2011, Petitioner and Paul T. Stroup, also of Corry, timely filed a Petition for Review of the permits pursuant to 40 C.F.R. § 124.19(a) before this Honorable Board.<sup>1</sup>

On June 28, 2012, the Board rendered its decision of the Petition for Review. The Board’s order remanded the permits to EPA Region 3 with respect to EPA’s regulatory obligations “to account for and consider all drinking water wells within the area of review of the injection wells.” Order at 7. On remand, the Board specifically instructed Region 3 to “clearly

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<sup>1</sup> Since then, the original counsel of record for Messrs. Peiffer and Stroup withdrew her appearance, the undersigned counsel entered their appearance on behalf of Petitioner Peiffer, and Mr. Stroup remained a petitioner and has been representing himself.

articulate its obligations and the data relied upon in complying with its obligations.” Order at 14. The Board denied review on all other issues. Order at 23.

## **II. Legal standard for motions for reconsideration**

Motions to reconsider a final order “must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors.” 40 C.F.R. § 124.19(g). Generally, reconsideration is reserved where the Board has made a demonstrable error such as a mistake of law or fact. *In re Shell Gulf of Mexico, Inc. Shell Offshore, Inc. Frontier Discovery Drilling Unit*, OCS Appeal No. 10-01 through 10-04, slip.op. at 7-8 (EAB Mar. 14, 2011) (Orders On Motions For Reconsideration And/Or Clarification) (citing multiple Board decisions). The reconsideration process should not be used to reargue the case in a more convincing fashion. *Id.* (quoting *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121 (EAB 1999)).

## **III. The Board demonstrably erred in determining that consideration of population growth falls outside the ambit of the UIC permitting process.**

In its Order, the Board stated that the considerations of population growth and adverse economic impact are outside the Board’s scope of review. Order at 18-19. Population growth, however, is within the Board’s scope of review. When determining the fixed radius area of review, among the factors to be considered are “population and ground-water use and dependence.” 40 C.F.R. § 146.6(b). Petitioner raised this issue in the comments and the Petition For Review.

Part C of the Safe Drinking Water Act (“SDWA”), Pub. L. No. 93-523 (1974) (codified as amended at 42 U.S.C. § 300f et seq. (2006)) establishes the underground injection control program and prohibits any underground injection except as authorized by rule or permit. 42 U.S.C. §§ 300h(b)(1)(A) and 300h-1(c). The SDWA requires a permittee to demonstrate that

any underground injection will not endanger underground sources of drinking water (“USDWs”).  
42 U.S.C. § 300h(b)(1)(B).

In order to ensure that an underground injection well will not endanger USDWs, the Agency’s regulations require an area of review for “*each* injection well or each field, project or area of the State.” 40 C.F.R. § 146.6 (emphasis added). Section 146.6 establishes two permissible options for determining an area of review. The first is a zone of endangering influence determined from a mathematical model, which accounts for hydraulic conductivity, subsurface lithology, and other factors. The second is a fixed radius area of review. TetraTech, on behalf of Permittee, performed the calculations necessary to determine the area of review under the mathematical model. *See* Area of Review Module (modules for each permit included), attached as Exhibits 1 & 2. However, TetraTech ultimately concluded that a fixed radius area of review of ¼ mile was appropriate in this case. *Id* (see section on page 4 of each module titled Conclusions). Consequently, Permittee must be bound to the standards governing determination of a fixed radius area of review.

While the area of review may be determined using either the mathematical model or the fixed radius model, a Permittee applying the fixed radius area of review must use a “fixed radius around the well of not less than one-fourth (¼) mile.” 40 C.F.R. § 146.6(b)(1). As the plain language of the regulation makes clear, a ¼ mile is the minimum permissible radius for a fixed radius area of review. In fact, the following factors must be considered when determining the fixed radius area of review: “Chemistry of injected and formation fluids; hydrogeology; *population and ground-water use and dependence*; and historical practices in the area.”  
40 C.F.R. § 146.6(b) (emphasis added).

Permittee failed to consider population and ground-water use and dependence and historical practices in the Columbus Township area when determining the fixed radius area of review. *See* Exs. 1 & 2. Had the Agency properly considered the population factor when reviewing the applications, it may have determined, among other things, that the fixed area radius of review of ¼ mile was insufficiently protective of underground sources of drinking water.

The Agency failed to address this defect in its Responsiveness Summary to Public Comment, attached as Exhibit 3. In fact, the Agency incorrectly stated in Response #6 that Permittee's area of review was determined by calculation of the zone of endangering influence. As noted, *supra*, TetraTech, on behalf of Permittee, performed calculations for the zone of endangering influence, but ultimately opted for the fixed radius area of review as provided for by 40 C.F.R. § 146.6(b). That the Agency incorrectly believed Permittee to have applied the zone of endangering influence strongly suggests that neither could have taken into account those considerations required for a fixed radius area of review.

**IV. The Board demonstrably erred in determining that Petitioner did not object to the area of review formulation.**

The area of review applied by Permittee was either an explicit or implicit issue of concern to many commenters on Permits. As Response Nos. 6-9 in EPA's Responsiveness Summary indicate, commenters were concerned that EPA's review did not extend into New York; that Permittee failed to disclose all wells within the area of review; and that the Bittinger Wells lack mechanical integrity. In fact, Petitioner in his submitted comments raised concerns in his comment about a lack of coordination with New York municipalities, EPA Region II, and NY DEC. *See* Peiffer Comment at 1-2, attached as Exhibit 4. Additionally, Petitioner expressed concern about historical drilling practices in Pennsylvania and the community's reliance on the

Brokenstraw Watershed. *Id.* at 3-4. Therefore, the Board erred in stating that “Petitioners do not object to the Region’s area of review determination.” Order at 8. In fact, while the phrase “area of review” may not have been present in the comments or the Petition For Review, the objections to the area of review determination were very much present. Protection of USDWs is an area over which the Agency has jurisdiction, and failure to consider the factors from 40 C.F.R. § 146.6 is an error of law that merits the Board’s review. *See In the Matter of Renkiewicz SWD-18*, 4 E.A.D. 61, 65 (EAB 1992) (remanding a UIC permit where EPA failed to consider impacts on threatened or endangered species as required by the Endangered Species Act and incorporated into UIC regulations at 40 C.F.R. §144.4).

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The Board committed an error of fact when it stated that the Petitioner did not raise the issue of whether or not the area of review was appropriate, and it committed an error of law when it stated that population as a consideration was outside the scope of the UIC permitting process and therefore the Board’s scope of review. In light of the above Petitioner respectfully requests that the Board reconsider § V.D. of its Order and its determination that Petitioner had no objection to the area of review formulation. Upon reconsideration, Petitioner asks the Board to consider the merits of whether the Agency erred by not properly considering population during the permitting process.

Dated: July 9, 2012

Respectfully Submitted,

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**Certificate of Service**

I, Oday Salim, certify that on July 9, 2012, a true and correct copy of the foregoing *Petitioner's Motion For Partial Reconsideration* was filed electronically with the Environmental Appeals Board and served on the following:

By virtue of electronic filing and additionally by electronic mail

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Dated: July 9, 2012

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