

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

In the Matter of:)	
West Bay Exploration Company of Traverse City, Michigan, Haystead #9 SWD, Permit No. MI-075-2D-0010, Jackson County, Michigan.)	Permit Appeal No. UIC 14-66

**EPA REGION 5 RESPONSE TO MOTION FOR RECONSIDERATION
AND MOTION TO SUPPLEMENT THE RECORD**

Region 5 of the United States Environmental Protection Agency (the Region) hereby responds to, and opposes, the September 30, 2014 Motion for Reconsideration and October 1, 2014 Motion to Supplement the Record (Motions) filed with the Environmental Appeals Board (EAB or Board) by Mr. Peter Bormuth (Petitioner Bormuth) in the above-captioned matter. Petitioner Bormuth's Motions ask the Board to reconsider its September 22, 2014 final Order Denying Review (Bormuth Decision) of Petitioner's May 18, 2014 Petition for Review (Bormuth Petition) in this appeal and to allow Petitioner to supplement the record in the matter.

Motions for reconsideration are rarely granted by the Board, or courts in general, because in order to prevail, a petitioner must demonstrate clear error by the Board, such as a mistake of fact or law. Such motions are not to be made merely: to reargue the matter in a more convincing fashion; to present new legal theories or restate prior arguments; to introduce new evidence that could have been properly produced in the matter; or because a petitioner is dissatisfied with a decision of the EAB. Rather, a petitioner must cite the Board's rationale and show specific fact or law that was argued contrary to it. It is a high standard that is rarely met and it has not been met in

this instance. In addition, with regard to Petitioner's Motion to Supplement the Record, 40 C.F.R. § 124 does not provide for supplementation of the record after the EAB issues a final decision.

In support of its opposition to the Motions, the Region states as follows:

1. On April 29, 2011, the West Bay Exploration Company, Traverse City, Michigan, (Permittee) submitted an application to the Region for the construction and operation of a new Class II well for brine disposal, pursuant to the Underground Injection Control Program, Part C of the Safe Water Drinking Act, 42 U.S.C. § 300h *et seq.* The well is to be located in Jackson County, Michigan and known as the "Haystead #9 SWD."
2. On April 9, 2014, the Region issued a final permit to the Permittee for the Haystead #9 SWD well [Permit No. MI-075-2D-0010] (Haystead #9 Permit). The Region also simultaneously issued a Response to Public Comment document (RTC) summarizing the Agency's responses to all of the public comments received on the proposed permit action. The notice of the final permit and RTC was mailed to all persons who provided EPA with comments and to other State and federal officials and provided instructions on how to appeal the permit to the EAB. See 40 C.F.R. §§ 124.15(a) and 124.19.
3. During the 47 day public comment period, which ended on May 14, 2013, Petitioner submitted written comments on the draft permit to the Region on April 16, April 30 and May 2, 2013, and oral comments at the EPA's April 30, 2014 public hearing.
4. On May 8, 2014, Petitioner Bormuth filed his Petition with the EAB seeking review of the Haystead #9 Permit [EAB Appeal No. UIC 14-66].

5. On May 14, 2014, Ms. Sandra Yerman (Petitioner Yerman) filed a Petition with the EAB seeking review of the Haystead #9 Permit [EAB Appeal No. UIC 14-67] (Yerman Petition).
6. On July 3, 2014, the Board issued a Final Decision on the Yerman Petition denying review of her Petition due to the fact that she failed to meet the threshold requirements for Board review under 40 C.F.R. § 124.19 (Yerman Decision). *See In re W. Bay Exploration Co.*, UIC Appeal No. 14-67, (EAB July 3, 2014) (Order Denying Review)
7. On July 10, 2014, the Region filed its Response to the Bormuth Petition with the EAB.
8. On September 22, 2014, the Board issued its Bormuth Decision holding that Petitioner Bormuth failed to demonstrate that the Region's decision to grant the Haystead #9 Permit was based on a clearly erroneous finding of fact or conclusion of law and, therefore, denied his Petition. *See In re W. Bay Exploration Co.*, UIC Appeal No. 14-66, (EAB September 22, 2014) (Order Denying Review).
9. On September 30 and October 1, 2014, Petitioner Bormuth filed the subject Motions with the Board.
10. On October 1, 2014, the Region issued a final UIC permit decision to the Permittee per 40 CFR 124.19(1)(2).
11. On October 2 and 6, 2014, respectively, the Region was served with copies of the Motions.
12. 40 C.F.R. § 124.19(m) requires that motions for reconsideration set forth the matters claimed to have been erroneously decided and the nature of the alleged errors.

13. 40 C.F.R. § 124 does not provide for the supplementation of the record after the EAB issues a final decision.
14. Courts have consistently held that motions for reconsideration "are not vehicles for bringing before the court theories or arguments that were not advanced earlier. Nor may the motion present evidence which was available but not offered at the original [motion]." *Natural Resources Defense Council, Inc. v. United States Environmental Protection Agency*, 705 F. Supp. 698, 701-02, *vacated on other grounds*, 707 F. Supp. 3 (D.D.C. 1989) (citations omitted). In addition, "[t]he proponent of such a motion [for re-argument] is not supposed to treat the court's initial decision as the opening of a dialogue" in which the party may advance new facts or theories in response to the Court's decision. *Patterson--Priori v. Unum Life Insurance Co. of America*, 846 F. Supp. 1102, 1108 (E.D.N.Y. 1994) (quoting *McMahan & Co. v. Donaldson, Lufkin & Jenrette*, 727 F. Supp. 833, 833 (S.D.N.Y. 1989)). Also, a motion for reconsideration should not be an avenue for a party to "re-litigate old matters" or "take a second bite at the apple," *Project Strategies Corp. v. National Communication Corp.*, No. 94 Cv. 4925, 1997 WL 67517 at *1 (E.D.N.Y. January 31, 1997) (citations omitted).
15. The Board has addressed these issues as well by stating that reconsideration under 40 C.F.R. § 124.19(m) is generally reserved for cases in which the EAB is shown to have made a "demonstrable error, such as a mistake of law or fact." *In re Bear Lake Properties, LLC*, UIC Appeal Nos. 11-03, at 2-3 (EAB July 26, 2012) (citations omitted); *See also, In re Knauf Fiber Glass, GmbH*, PSD Appeal Nos. 98-3 et al., at 3 (EAB, Feb. 4, 1999) (Order on Motions for Reconsideration); *In re Arizona Municipal*

Storm Water NPDES Permits, NPDES Appeal No. 97-3, at 2 (EAB Aug. 17, 1998) (Order Denying Motion for Reconsideration); *In re West Bay Exploration Co.*, UIC Appeal Nos. 13-01 and 13-02 at 1 (EAB May 29, 2013).

16. In addition, the reconsideration process “should not be regarded as an opportunity to reargue the case in a more convincing fashion.” *In re Southern Timber Prods., Inc.*, 3 E.A.D. 880, 889 (JO 1992). A party's failure to present its strongest case in the first instance does not entitle it to a second chance in the form of a motion to reconsider. *Arizona* at 2, citing *Publishers Resource, Inc. v. Walker-Davis Publications, Inc.*, 762 F.2d 557, 561 (7th Cir. 1985) (“Motions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence. Such motions cannot in any case be employed as a vehicle to introduce new evidence that could have been adduced during the pendency of the [original] motion. * * * Nor should a motion for reconsideration serve as the occasion to tender new legal theories for the first time.”) (citation omitted).” See also, *In re Shell Gulf of Mexico, Inc., et al.*, OCS PSD Appeal Nos. 10-1 through 10-4 at 7-8 (EAB Feb. 10, 2011) (Order on Motions for Reconsideration and/or Clarification).

17. None of the arguments made by the Petitioner’s Motion for Reconsideration are new or set forth a matter erroneously decided by the Board. Nor does Petitioner present any newly discovered evidence in the matter. In addition, with regard to several of the Petitioner’s arguments, he cites to irrelevant facts from a separate, albeit related, EAB UIC appeal and, therefore, these facts are not properly before the Board in this proceeding. Also, Petitioner’s attempt to supplement the record is yet another attempt

to introduce evidence that has been previously rejected by the Board, and intended solely to support the arguments made in his Motion for Reconsideration. Accordingly both of his Motions should be denied.

18. Petitioner's argument that the Board committed reversible error by showing repeated bias towards the Petitioner has no merit. Petitioner cites numerous facts from another UIC proceeding (West Bay #22, Permit No. MI-075-2D-0009, UIC Appeals 13-01 and 13-02) to support his contentions. First, these facts are not properly before the Board in this matter. Second, even if they were, these facts do not demonstrate bias, or arbitrary or capricious behavior, towards the Petitioner by either the Region or the Board. If anything, they demonstrate the remarkable persistence of the Petitioner. Accordingly there was no error by the Board which should be reconsidered.

19. Petitioner's argument that the Board committed reversible error by allowing Petitioner Yerman to file her Petition in this matter after the filing deadline also has no merit. The Board may relax or suspend filing requirements of 40 C.F.R. § 124.19 for good cause.

The Board stated in Footnote No. 1 of its Yerman Decision that because Petitioner Yerman had provided evidence to the EAB that her Petition "was correctly addressed and timely mailed by U.S. Express Mail but an error in routing by the U.S. Postal Service delayed delivery," the Board concluded that special circumstances existed to accept Petitioner Yerman's Petition. *In re W. Bay Exploration Co.*, UIC Appeal No. 14-67, at 1, Footnote No. 1 (EAB July 3, 2014). The Board acted reasonably and completely within its discretion in allowing Petitioner Yerman to file her Petition. Accordingly there was no error by the Board which should be reconsidered.

20. Petitioner's argument that the Board committed reversible error by not considering a number of studies Mr. Bormuth failed to submit during the public comment period, but then attached to his Petition, and now tries to submit to the EAB once again, also has no merit. As has been well documented in this proceeding, Petitioner Bormuth had numerous opportunities during the public comment process to submit copies of these studies to the Region, but he failed to do so. As the Board stated in its Bormuth Decision, petitioners are required to raise all ascertainable issues and reasonably available arguments to the Region, i.e. the permitting authority, during the comment period on the draft permit and the Board will not consider issues raised for the first time on appeal. EAB regulations require the "exhaustion of issues before the permit issuer..." prior to Board review. *In re W. Bay Exploration Co.*, UIC Appeal No. 14-66, at 12 -13 (EAB Sep. 22, 2014). Accordingly there was no error by the Board which should be reconsidered.

21. Petitioner Bormuth is again attempting to subvert the UIC permitting process. As the Board stated in the Bormuth Decision, "...attempting to use this appeal to bypass the Region, the permit issuing authority here. He has saved the full elaboration of his argument and the supporting scientific articles for presentation to the Board in his permit appeal. Allowing this tactic would turn the administrative process on its head." Bormuth Decision, Pg. 12. These Motions are merely another attempt by the Petitioner to bypass the Region and to have the Board make a different scientific finding more to his liking. Petitioner's attempt to again introduce these studies in this proceeding to

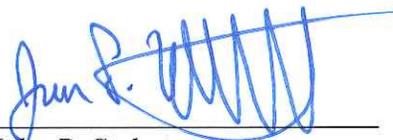
support his underground drinking water supply endangerment argument should be rejected.

22. While the Petitioner is a *pro se* petitioner, for whom the Board may relax some of the more technical pleading standards for petitioners unrepresented by legal counsel, *see In re Environmental Disposal Sys., Inc.* 12 E.A.D. 254, 292, n. 26 (EAB 2005); *In re Beckman Prod. Servs.*, 5 E.A.D. 10, 19 (EAB 1994), this consideration has no import here as there are no technical pleading standards at issue. The only question is whether the Petitioner has met his burden to demonstrate clear error by the Board and he has not met this burden. Accordingly, the fact that Petitioner is *pro se* is irrelevant to the Board's decision here.

In sum, 40 C.F.R. § 124.19(m) requires that motions for reconsideration set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. Petitioner has not identified any reversible error made by the Board; he has not presented any newly discovered evidence in the matter; nor has he presented any new facts or arguments in his Motion for Reconsideration which should cause the EAB to reconsider its prior decision. In addition, 40 C.F.R. § 124 does not allow for the supplementation of the record after the EAB issues a final decision and, even if the Board decided to use its discretion to consider such a motion, the Petitioner has not provided a reasonable or legitimate basis upon which it may be granted.

Accordingly, the Region opposes the Motion and objects to any reconsideration of the Board's Final Decision in this matter.

Respectfully submitted,



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Dated this **8th day of October, 2014.**

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In the Matter of:)	
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West Bay Exploration Company of)	Appeal No. UIC 14-66
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Haystead #9 SWD,)	
Permit No. MI-075-2D-0010,)	
Jackson County, Michigan.)	
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CERTIFICATE OF SERVICE

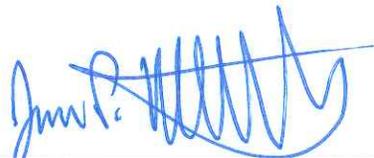
I hereby certify that the original of the attached **RESPONSE TO MOTIONS FOR RECONSIDERATION AND TO SUPPLEMENT THE RECORD** in the matter **WEST BAY EXPLORATION COMPANY OF TRAVERSE CITY, MICHIGAN, HAYSTEAD #9 SWD, PERMIT NO. MI-075-2D-0010, JACKSON COUNTY, MICHIGAN, EAB Appeal No. UIC 14-66**, was filed today with the Board electronically, via the Central Data Exchange.

Further, I hereby certify that one copy of the attached **RESPONSE TO MOTIONS FOR RECONSIDERATION AND TO SUPPLEMENT THE RECORD** in the matter **WEST BAY EXPLORATION COMPANY OF TRAVERSE CITY, MICHIGAN, HAYSTEAD #9 SWD, PERMIT NO. MI-075-2D-0010, JACKSON COUNTY, MICHIGAN, EAB Appeal No. UIC 14-66**, was sent to the Petitioner and Permit Applicant via Express Mail to the following addresses:

Peter Bormuth
142 West Pearl Street
Jackson, Michigan 40201

and

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



John P Steketee

October 8, 2014

Date