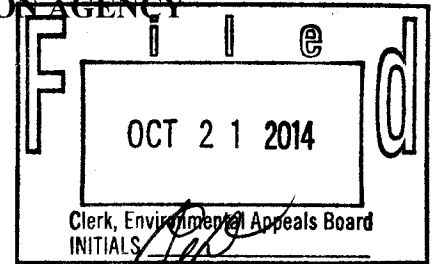


BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC



In re:)
)
)
West Bay Exploration Co.)
)
UIC Permit No. MI-075-2D-0010)
_____)

UIC Appeal No. 14-66

ORDER DENYING RECONSIDERATION

Mr. Peter Bormuth seeks reconsideration of the Environmental Appeal Board's September 22, 2014 order denying his petition challenging an Underground Injection Control permit granted by U.S. Environmental Protection Agency Region 5 ("Region") to West Bay Exploration Company, Permit No. MI-075-2D-0010.¹ *See In re West Bay Exploration Co.*, UIC Appeal No. 14-66 (EAB Sept. 22, 2014) (Order Denying Review). Reconsideration is only appropriate upon a showing of "demonstrable error, such as a mistake of law or fact." *In re Bear Lake Properties, LLC*, UIC Appeal No. 11-03, at 2-3 (EAB July 26, 2012) (citing cases); *see* 40 C.F.R. § 124.19(m). A reconsideration motion should focus on identifying "clearly erroneous factual or legal conclusions." *In re S. Timber Prods., Inc.*, 3 E.A.D. 880, 889 (JO 1992) (quoting *In re City of Detroit*, TSCA Appeal No. 89-5, at 2 (CJO Feb. 20, 1991

¹ Mr. Bormuth filed both a motion for reconsideration and a motion to supplement the record. Petitioner Peter Bormuth's Motion for Reconsideration ("Reconsideration Motion"); Petitioner Peter Bormuth's Motion to Supplement the Record ("Motion to Supplement"). Because the latter motion also challenged the Board's decision denying Mr. Bormuth's petition, the Board treats this motion as a motion for reconsideration as well and decides both motions in this order.

(Order)). It is not an opportunity to reargue the original petition, either by raising arguments or facts that could have been presented earlier or attempting to frame prior arguments in a more convincing fashion. *Id.*; *In re Hawaii Elec. Light Co.*, PSD Appeal Nos. 97-15 through 97-22, at 6 (Mar. 3, 1999) (Order Denying Motion for Reconsideration). None of the arguments raised by Mr. Bormuth demonstrate a clear error of fact or law in the Board's decision on this matter.

First, Mr. Bormuth claims the Board erred by not applying a "preponderance of the evidence" standard in reviewing the Region's permit decision. Motion for Reconsideration at 3. This is incorrect. The EPA regulation governing permit appeals to the Board specifies that a permit challenger "must demonstrate that each challenge to a permit decision is based on: (A) A finding of fact or conclusion of law that is clearly erroneous, or (B) An exercise of discretion or an important policy consideration that the Environmental Appeals Board should, in its discretion, review." 40 C.F.R. § 124.19(a)(4)(i); *In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 509 (EAB 2006). In support of his argument, Mr. Bormuth mistakenly relies on a Board decision discussing the burden of proof EPA faces in an administrative penalty proceeding before an administrative law judge. Motion for Reconsideration at 3 (citing *In re Bullen Cos.*, 9 E.A.D. 620, 632 (EAB 2001)).

Second, Mr. Bormuth claims that the Board "must exercise its discretion to review an important policy matter, i.e. whether [seventeen wells permitted at similar strata in the lower Michigan basin] constitute a danger to our Michigan aquifers." *Id.* Rather than identifying a clear error, this argument invites the Board to take action beyond its jurisdiction. The Board may only exercise such authority as is expressly delegated to it, 40 C.F.R. § 1.25(e)(2), and, as regards permit appeals, it is only authorized to hear appeals from specific permit decisions. 40 C.F.R.

§ 124.19(a)(1). Therefore, the Board's authority in this matter is limited to review of the specific permit challenged in Mr. Bormuth's petition.

Third, Mr. Bormuth claims that the Board has shown "bias and a deliberate intent to avoid the Petitioner's full argument." Motion for Reconsideration at 6. As evidence of bias, Mr. Bormuth cites the Board's handling of petitions by Sandra K. Yerman in this proceeding as well as in a prior proceeding involving Mr. Bormuth. Mr. Bormuth claims that the Board showed favoritism by accepting Ms. Yerman's allegedly late-filed petitions and rejecting as untimely the majority of the scientific studies he filed with the Board. *Id.* These allegations lack merit. The Board's rulings on the timeliness of Ms. Yerman's petitions and Mr. Bormuth's filing of scientific studies followed EPA regulations and well-established Board precedent.² Moreover, in both proceedings, the Board disposed of Ms. Yerman's and Mr. Bormuth's petitions in a nearly identical manner. In the prior proceeding, both of their petitions were dismissed as moot.³ In this proceeding, both petitions were denied.⁴ Once again, Mr. Bormuth has not identified a demonstrable error.

Fourth, Mr. Bormuth argues that the Board erred in not considering various scientific

² *In re West Bay Exploration Co. ("West Bay I")*, UIC Appeal Nos. 13-01 & 13-02 (EAB Apr. 16, 2013) (Order Dismissing Petitions for Review as Moot); *In re West Bay Exploration Co. ("West Bay II")*, UIC Appeal Nos. 13-01 & 13-02, at 2-3 (EAB May 22, 2014) (Order Denying Reconsideration) (explaining that Ms. Yerman's petition was timely); *In re West Bay Exploration Co. ("West Bay III")*, UIC Appeal No. 14-67, at 1 n.1 (EAB July 3, 2014) (Order Denying Review) (accepting Ms. Yerman's late-filed petition); *In re West Bay Exploration Co. ("West Bay IV")*, UIC Appeal No. 14-66, at 11-13 (EAB Sept. 22, 2014) (Order Denying Review) (refusing to consider many of the articles Mr. Bormuth attached to his petition).

³ *West Bay I* at 3.

⁴ *West Bay III* at 9; *West Bay IV* at 19.

articles attached to his petition because, Mr. Bormuth contends, the articles were submitted in response to material newly added to the record by the Region in responding to public comments on the draft permit. Motion to Supplement at 1. This claim does not support reconsideration of the Board's decision because it simply reargues an issue – whether the Board should consider the articles attached to the petition – already briefed by the parties. More problematically, Mr. Bormuth's current argument for why these articles should be considered could have been presented in his reply brief but was not. *See* Petitioner Peter Bormuth's Reply to EPA Response to Petition for Review UIC 14-66, at 1-2 (arguing only that the Board should consider the late-filed articles because they had been offered to the Region).

In any event, Mr. Bormuth's new argument has no merit. Although Mr. Bormuth lists eighteen separate articles or documents,⁵ he only attempts to tie three of these articles to statements in the Region's response to comments document. *Id.* at 3, 4. The first of these articles, according to Mr. Bormuth, shows that anhydrite can be quickly converted to gypsum. *Id.* at 3. But this is the core argument Mr. Bormuth submitted to the Region during the comment period. If he had documentary evidence to support this argument, he should have submitted it at that time. Second, Mr. Bormuth cites to two articles that he claims demonstrate that there is cross-formational flow of fluids in the Coldwater Shale. *Id.* at 4, 5. However, Mr. Bormuth was well aware that the Region relied on the Coldwater Shale, among other geological strata, as a confining layer. If Mr. Bormuth had documentary evidence disputing the permeability of the Coldwater Shale, he should have included it with his other comments on the Coldwater Shale

⁵ The articles are dated between 1958 and January 10, 2013, and thus were available to Mr. Bormuth prior to the public comment period on the draft Permit which began on March 27, 2013. U.S. EPA Region 5, Response to Public Comments at 50 (Apr. 9, 2014) (A.R. 68).

that he submitted during the public comment period.

Finally, Mr. Bormuth argues that a permit the Region issued on June 14, 2006, shows the Region erred in issuing the West Bay permit. *Id.* at 5-6. Mr. Bormuth claims that he just received a copy of this permit pursuant to a Freedom of Information Act request. But Mr. Bormuth provides no justification for why he could not have submitted this 2006 permit during the public comment period on the West Bay permit. Moreover, Mr. Bormuth relies on the 2006 permit to make new arguments (the Region committed “willful and wanton misconduct” and the Region has understated the fracturing the well will cause), and to support an argument made for the first time in his reply brief (the injected brine will dissolve salt layers). *Id.* It is far too late in this appeal to submit a new document or to raise new arguments or an argument previously dismissed as untimely.⁶ Reconsideration is not appropriate based on such claims.

⁶ See *West Bay IV* at 11 n.8 (dismissing Mr. Bormuth’s argument concerning salt layers for failing to raise it prior to the filing of his reply brief).

Accordingly, because Mr. Bormuth has not identified any demonstrable error in the Board's decision on his petition, the Board denies his motion for reconsideration.

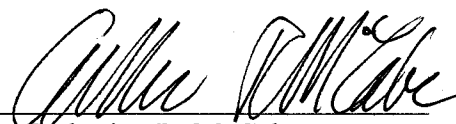
So ordered.

Dated:

October 21, 2014

ENVIRONMENTAL APPEALS BOARD⁷

By:



Catherine R. McCabe
Environmental Appeals Judge

⁷ The three-member panel deciding this matter is composed of Leslye M. Fraser, Catherine R. McCabe, and Kathie A. Stein.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **Order Denying Reconsideration** in the matter of West Bay Exploration Co., UIC Appeal No. 14-66 were sent to the following persons in the manner indicated:

By U.S. First Class Mail:

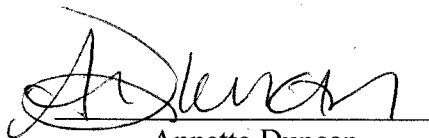
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Dated: OCT 21 2014



Annette Duncan
Secretary