

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

In re:)	
)	
West Bay Exploration Co.,)	UIC Appeal No. 18-01
Haystead #9 SWD)	
)	
Permit No. MI-075-2D-0010)	
)	

ORDER DISMISSING INFORMAL APPEAL

I. INTRODUCTION

Mr. Peter C. Bormuth informally appeals to the Environmental Appeals Board his request that the U.S. Environmental Protection Agency, Region 5, terminate an Underground Injection Control permit for a waste disposal well in Jackson County, Michigan. Mr. Bormuth requested termination of the permit under 40 C.F.R. § 124.5(a). *See* Petitioner Peter Bormuth’s Informal Letter of Appeal Under 40 C.F.R. § 124.5(b) at 1 (Jan. 16, 2018) (“Informal Appeal”). Although the Region has not issued a final response on Mr. Bormuth’s termination request, Mr. Bormuth claims that “the inaction by the Region constitutes an effective denial,” and, as a result, he is “informal[ly] appeal[ing]” this alleged denial pursuant to section 124.5(b). *See* Petitioner Peter Bormuth’s Reply to EPA Region 5 Response to Informal Appeal at 9 (Feb. 26, 2018) (“Informal Appeal Reply”). As explained below, we dismiss Mr. Bormuth’s informal appeal because it was filed prematurely and therefore cannot be considered by the Board under section 124.5(b).

II. PROCEDURAL HISTORY

A. The Underground Injection Control Program

The Underground Injection Control (“UIC”) Program was established under the Safe Drinking Water Act (“SDWA”) “to prevent underground injection which endangers drinking

water sources.” SDWA § 1421(b)(1), 42 U.S.C. § 300h(b)(1). EPA’s UIC regulations specifically prohibit “[a]ny underground injection[] except into a well authorized by rule or except as authorized by permit issued under the UIC program.” 40 C.F.R. § 144.11. An applicant for a permit must show that construction and operation of the underground injection well will not “endanger” drinking water sources by “allow[ing] the movement of fluid containing any contaminant into underground sources of drinking water, if the presence of that contaminant may cause a violation of any primary drinking water regulation under 40 CFR part 142 or may otherwise adversely affect the health of persons.” *Id.* § 144.12(a); *see* SDWA §1412(d)(2), 42 U.S.C. § 300h(d)(2). EPA administers the UIC program in those states that, like Michigan, are not yet authorized to administer their own programs. *See* 40 C.F.R. §§ 144.1(e), 147.1151.

Section 144.40 of the UIC regulations sets forth the substantive grounds for termination of UIC permits. *Id.* § 144.40; *see id.* § 124.5(a) (specifying that UIC “permits may only be * * * terminated for the reasons specified in * * * [40 C.F.R.] § 144.40”). The procedures for requesting termination of a UIC permit are specified in section 124.5. That section authorizes termination proceedings to be initiated “at the request of any interested person.” *Id.* § 124.5(a). If the Regional Administrator determines that a requested termination is not warranted, the Regional Administrator must “send the requester a brief written response giving a reason for the decision.” *Id.* § 124.5(b). A requester may appeal a denial of its request to the Environmental Appeals Board. *Id.* Specifically, section 124.5 states that “[d]enials by the Regional Administrator may be informally appealed to the Environmental Appeals Board by a letter briefly setting forth the relevant facts.” *Id.*; *see In re Env'tl. Disposal Sys., Inc.*, UIC Appeal No. 07-01, at 2 (EAB July 11, 2007) (“Order”) (“a denial of such a request is a prerequisite to filing

an informal appeal to the Board under § 124.5(b)”), *review dismissed per stip. sub nom. Envtl. Geo-Techs., Inc. v. EPA*, No. 07-4041 (6th Cir. Nov. 19, 2007).

B. *The Contested UIC Well*

The origin of this informal appeal is Mr. Bormuth’s November 2016 request that the Region terminate a UIC permit granted to the West Bay Exploration Company (“West Bay”) applying to a well designated as “Haystead #9 SWD.” However, Mr. Bormuth’s interactions with the Region and the Board concerning Haystead #9 SWD arose several years earlier. These interactions included both a direct challenge to the Region’s issuance of the Haystead #9 SWD permit and a challenge to the Region’s issuance of another UIC well permit in which Mr. Bormuth again raised concerns about the Haystead #9 SWD permit.

The Region issued the permit for Haystead #9 SWD in April 2014. Under the permit, West Bay may use the well to dispose of waste brine from oil and gas production activities. Mr. Bormuth filed comments with the Region objecting to a proposed draft of the permit, and after the Region’s issuance of the permit, appealed that decision to the Board. The Board denied Mr. Bormuth’s challenge to the permit, concluding that “Mr. Bormuth [had] failed to demonstrate that the Region made a clear error of fact or law in finding that the Haystead well does not present an endangerment to underground supplies of drinking water.” *In re W. Bay Explor. Co.* (“*W. Bay I*”), UIC Appeal No. 14-66, at 16 (EAB Sept. 22, 2014) (“Order Denying Review”).

Two years later Mr. Bormuth challenged a West Bay permit for another UIC well. *See generally In re W. Bay Explor. Co.* (“*W. Bay II*”), 17 E.A.D. 204 (EAB 2016). This second well was designated as “West Bay #22 SWD” and was also intended to be constructed in Jackson County, Michigan. *Id.* at 206. The Board granted review of the West Bay #22 SWD permit, and

remanded it to the Region because (1) there were “unexplained discrepancies” in the record that suggested that “[f]ive of the geologic formations that the Region cited as confining any injected brine may be absent from the wellsite,” and (2) the Region had not adequately responded to a series of “complex, scientific arguments” in Mr. Bormuth’s comments on the draft permit. *Id.* at 224-25.

Mr. Bormuth thereafter relied on his successful challenge to the West Bay #22 SWD permit in an attempt to invalidate the Haystead #9 SWD permit. Specifically, he filed a motion for clarification of the Board’s decision on the West Bay #22 SWD permit in which he requested that the Board explain “how the Board’s decision on the West Bay #22 SWD permit affects the Haystead #9 and Moore #3-14 wells.”¹ *See In re W. Bay Explor. Co.*, UIC Appeal No. 15-03, at 2 (EAB Aug. 31, 2016) (“Order Responding to Motion for Clarification”). The Board denied the motion for clarification because the permits for Haystead #9 SWD and Moore #3-14 wells were not covered by the West Bay #22 SWD permit, and thus were not before the Board in the appeal challenging the West Bay #22 SWD permit. However, the Board noted that the Region, in responding to Mr. Bormuth’s motion, had stated that “other procedures exist for Mr. Bormuth to raise concerns to EPA on the Haystead #9 and Moore #3-14 wells.” *Id.* Specifically, as to the Haystead #9 SWD permit, the Region explained:

[I]f Mr. Bormuth wishes to challenge the Haystead #9 Permit again, he may “pursue his administrative remedy under the UIC regulations and seek modification, termination, or revocation and reissuance of the Haystead #9 Permit under 40 C.F.R. § 124.5.”

¹ In briefing Mr. Bormuth’s challenge to the West Bay #22 SWD permit, the Region stated that the Haystead #9 SWD well “has the same injection zone * * * [and] has the same upper confining layers” as the West Bay #22 well. *See U.S. EPA Region 5, Response to Petition for Review*, UIC Appeal No. 15-03, at 1, 5-6 (Feb. 1, 2016).

Id. (quoting Response to Petitioner’s Motion for Clarification at 7). Following this guidance from the Region, Mr. Bormuth filed the November 2016 request for termination of the Haystead #9 SWD permit that forms the basis for the current informal appeal.

III. ANALYSIS

EPA regulations establish that the Board has jurisdiction to hear informal appeals of requests for termination of permits where there has been a “[d]enial[] by the Regional Administrator.” 40 C.F.R. § 124.5(b). It is undisputed here that the Region has not issued a final response to Mr. Bormuth’s request for termination of the Haystead #9 SWD permit, and thus there is no denial by the Regional Administrator for Mr. Bormuth to appeal.

Despite the lack of a final response denying his termination request, Mr. Bormuth contends that the Region’s failure to act on his request in the fourteen months since the request was submitted constitutes an “effective denial.” Informal Appeal at 1-2; Informal Appeal Reply at 9. Mr. Bormuth claims that the Region has actually had longer than fourteen months to address his scientific contentions on the danger to drinking water posed by the Haystead #9 SWD well. He asserts that the Region has had “all of the relevant evidence in [its] possession since 2015,” Informal Appeal Reply at 6, pointing to the scientific articles he submitted to the Region in his public comments on the proposed West Bay #22 SWD permit in late 2014. *Id.* at 7; *see West Bay II*, 17 E.A.D. at 206 (noting that Mr. Bormuth submitted twenty scientific articles at a November 2014 public hearing on the West Bay #22 SWD permit). Mr. Bormuth argues that the Region’s alleged inaction is a “deliberate[]” attempt to deny him the opportunity to seek judicial review of the Region’s decision on the safety of the permitted well. Informal Appeal at 2-3. In response, the Region argues that it “has not acted unreasonably in this matter,” and “[t]he length of time it has taken * * * to make a decision * * * does not constitute an

‘effective denial’ of the request.” EPA Region 5 Response to Informal Appeal Under 40 C.F.R. § 124.5(b) at 3-4 (Feb. 14, 2018) (“Region Resp. to Informal Appeal”).

Assuming, without deciding, that in the absence of an actual denial there are circumstances under which an “effective denial” can constitute a denial of a termination request within the meaning of §124.5(b), Mr. Bormuth has not shown that the Region has effectively denied his request to terminate the Haystead #9 SWD permit. *See In re Env'tl. Disposal Sys.*, UIC Appeal No. 07-01, at 3. Several factors convince us of this. First, the Region has repeatedly reaffirmed that it intends to issue a final decision on Mr. Bormuth’s termination request. Region Resp. to Informal Appeal at 1, 3-4, 13. Mr. Bormuth objects to the timing of the Region’s decision but does not credibly demonstrate that the Region does not intend to issue a final response to his request. Second, when contacted by Mr. Bormuth about his request, the Region has “provided him with updates on the progress of the review; and despite the passage of time, notified him that the Regional Administrator intended to make a decision on his Request for Termination.” *Id.* at 3-4. Finally, the Region has explained that taking fourteen months to address a termination request is not “extraordinary.” *Id.* at 4. The Region has detailed the regulatory and enforcement actions pending in its UIC Program office and stated that, “[g]iven the complex regulatory requirements of the SWDA UIC Program and other work demands in the Program, * * * the Regional Administrator has not acted unreasonably.” *Id.* The Board is generally reluctant to “second-guess” decisions by a regional office on how it allocates and prioritizes its resources. *See In re Env'tl. Disposal Sys., Inc.*, 14 E.A.D. 96, 131-32 (EAB 2008).

We also do not accept Mr. Bormuth’s contention that the Region has had longer than fourteen months to resolve his termination request. Mr. Bormuth’s presentation of evidence in the West Bay #22 SWD permit proceeding that Mr. Bormuth argues bears on the Haystead #9

SWD permit did not, by itself, alert the Region concerning a termination request that had not yet been made. If anything, Mr. Bormuth's focus on the West Bay #22 permit proceedings highlights the potential complexity of the issues related to the Haystead #9 SWD permit. As to both of these permits, Mr. Bormuth makes hydrogeological arguments as to how various rock layers will react to the injection of waste brine and the characteristics of the multiple rock layers at the well sites. *See* Peter Bormuth, Request for Termination of Permit #MI-075-2D-0010, at 1-6, 9-11 (Nov. 11, 2016) (appended to Informal Appeal); *West Bay II*, 17 E.A.D. at 223. In evaluating Mr. Bormuth's termination request, we would expect that the Region will consider what impact, if any, the Board's recent decision on the West Bay #22 SWD permit has on Mr. Bormuth's termination request for Haystead #9 SWD permit. And it is appropriate for the Region to do so in the first instance, as these types of issues fall within the Region's technical expertise. *See W. Bay I*, UIC Appeal No. 14-66, at 12 ("The Region * * * has the technical expertise to grapple with complex scientific questions * * * as a first line decision-maker.").

In sum, Mr. Bormuth has not demonstrated that the Region has effectively denied his termination request. Mr. Bormuth's claim of inaction by the Region does not warrant that the Board taking the extraordinary step of accepting and deciding this complex scientific matter in the absence of: (1) a record created by the Region; and (2) the Region's determination on the merits of Mr. Bormuth's termination request. The Region recognizes that it may not "completely ignor[e] a [termination] request or * * * fail[] to properly review a request." Region Resp. to

Informal Appeal at 3. Thus, we expect that the Region will complete its analysis of Mr. Bormuth's termination request and issue a final decision on that request.²

IV. *CONCLUSION*

For the reasons explained above, Mr. Bormuth's informal appeal of his request for termination of West Bay's UIC permit for the Haystead #9 SWD well is dismissed.

So ordered.³

ENVIRONMENTAL APPEALS BOARD

Dated: April 26, 2018

By: 
Kathie A. Stein
Environmental Appeals Judge

² Having determined that Mr. Bormuth has not shown that the Region has effectively denied his termination request, we do not reach the Region's claim that Mr. Bormuth's appeal should be denied because it includes language that is a "gratuitous attack" on the Region. *See* Region Resp. to Informal Appeal at 2.

³ The three-member panel deciding this matter is composed of Environmental Appeals Judges Mary Kay Lynch, Kathie A. Stein, and Mary Beth Ward.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **ORDER DISMISSING INFORMAL APPEAL** in the matter of West Bay Exploration Company, Haystead #9 SWD, UIC Appeal No. 18-01 were sent to the following persons in the manner indicated:

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Dated: April 26, 2018



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