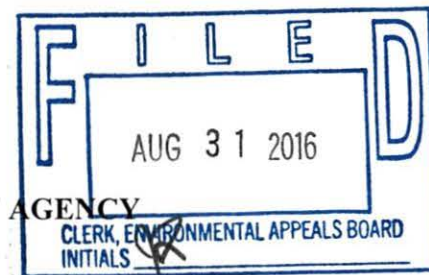


ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



In re:)
)
West Bay Exploration Company, Traverse) UIC Appeal No. 15-03
City, Michigan, West Bay #22 SWD)
)
Permit No. MI-075-2D-0009)
_____)

ORDER RESPONDING TO MOTION FOR CLARIFICATION

On July 26, 2016, the Environmental Appeals Board issued a Remand Order in this appeal of an Underground Injection Control (“UIC”) permit. *In re West Bay Exploration Co.*, UIC No. 15-03 (EAB July 26, 2016), 17 E.A.D. __. West Bay Exploration Company sought that permit for an injection well titled “West Bay #22 SWD.” In its Remand Order, the Board ordered U.S. Environmental Protection Agency, Region 5 to reconsider the issue of whether the geologic formations at the wellsite would prevent injected brine from contaminating underground sources of drinking water, taking into account the administrative record as a whole and all of the arguments that Mr. Peter Bormuth, the Petitioner, raised in his public comments and in his appeal before the Board. *Id.*, slip op. at 23, 17 E.A.D. at __. Mr. Bormuth has timely filed a Motion for Clarification under section 124.19(m) of EPA’s permit appeal regulations. *See* 40 C.F.R. § 124.19(m).

In his Motion, Mr. Bormuth raises two issues for clarification. First, he seeks clarification on how the Board’s decision on the West Bay #22 SWD permit affects a UIC permit previously approved by Region 5 (Haystead #9 well) and a UIC permit application that is currently pending before the Region (Moore #3-14 well). Second, Mr. Bormuth requests

clarification on whether the Region is required to address four specific technical questions on remand.

Mr. Bormuth's request for clarification on how the Board's decision on the West Bay #22 SWD permit affects the Haystead #9 and Moore #3-14 wells is not a proper request for clarification. A motion for clarification must address the "final disposition" of a permit appeal by the Board and "set forth with specificity the portion of the decision for which clarification is being sought and the reason clarification is necessary." 40 C.F.R. § 124.19(m). The "final disposition" in this case involved only the permit for West Bay #22 SWD well, not any other UIC well permits, pending or final. The Board is delegated the authority to decide appeals of specific permits. *See id.* § 124.19(a). It does not issue judgments on UIC permits not yet ripe for appeal to the Board under section 124.19, nor on permits for which the Board has previously issued a final decision. Nonetheless, Mr. Bormuth is not without options.

In its response to Mr. Bormuth's Motion, Region 5 noted that other procedures exist for Mr. Bormuth to raise concerns to EPA on the Haystead #9 and Moore #3-14 wells. As to the Moore #3-14 well, if Region 5 approves the permit pending for that well, Mr. Bormuth may, as a commenter on that permit application, appeal the Region's decision to the Board. *See id.*; Response to Petitioner's Motion for Clarification at 6-7. The permit for the Haystead #9 well was approved two years ago and upheld by the Board following an appeal by Mr. Bormuth. *In re West Bay Exploration Co.*, UIC Appeal No. 14-66 (EAB Sept. 22, 2014) (Order Denying Review). Nonetheless, as Region 5 points out, if 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." Response to Petitioner's Motion for Clarification at 7.

Mr. Bormuth also seeks clarification on whether Region 5 must address the following four technical issues on remand of the West Bay #22 SWD permit: (1) whether a UIC permit issued by Region 5 for the Sunoco Inkster Facility demonstrates that the salt layers in the B Evaporite Formation of the Salina Group will be dissolved by the injection of brine proposed for West Bay #22 SWD; (2) whether the injection pressure limits that Region 5 approved for other UIC wells indicate that the injection pressure limit for West Bay #22 SWD is arbitrary and capricious; (3) whether Region 5's model for calculating the lateral spread of injected brine is faulty; and (4) whether swelling pressures at the West Bay #22 SWD wellsite will render anhydritic shales unable to function as confining layers. As to the first technical issue, Mr. Bormuth states that the Board "inexplicably failed to require the EPA to discuss [the Sunoco Inkster Facility well] in its Remand Order." Petitioner Peter Bormuth's Motion for Clarification under 40 C.F.R. § 124.19(m) at 6. As to all of the issues, he requests that the Board direct that Region 5 address them on remand.

The Board's Order is clear on what issues Region 5 must consider on remand. The Order specifies that the West Bay #22 permit is remanded for:

Region 5 to reconsider the issue of whether the geologic formations at the West Bay #22 SWD wellsite will prevent the injected brine from contaminating the Marshall Sandstone aquifer, taking into account the administrative record as a whole and all of the arguments raised by Mr. Bormuth in his public comments and in this proceeding.

West Bay, slip op. at 23, 17 E.A.D. at ___. Notably, the Order requires the Region to consider "all of the arguments" raised by Mr. Bormuth "in his public comments and in this proceeding." *Id.* Mr. Bormuth does not claim that any aspect of this language is unclear. Rather, Mr. Bormuth asks the Board to instruct Region 5 that he raised the four technical issues described above in his public comments or briefs on appeal. However, the Board chose not to repeat in its Remand

Order each of the arguments Mr. Bormuth raised, and Mr. Bormuth offers no compelling reason to do so at this point. We note that Region 5 largely agrees with Mr. Bormuth's assertions as to the particular issues that it must consider on remand. In its brief responding to Mr. Bormuth's Motion for Clarification, Region 5 accepts that the issues on the dissolution of salt layers, the lateral spread of the injected brine, and the ability of anhydritic shales to function as confining layers are properly before it on remand under the Board's Order. Response to Petitioner's Motion at 10-13. Region 5 differs with Mr. Bormuth only on the question of whether it must address Mr. Bormuth's contention that the injection pressure limits Region 5 chose for other UIC wells show that the injection pressure limit for West Bay #22 SWD is arbitrary. *Id.* at 11-12. Region 5 asserts that this claim is based on both information on wells and an argument not included by Mr. Bormuth in his public comments or in the appeal to the Board.

To expedite the Region's consideration of the permit on remand, we briefly note that in the proceeding before the Board, Mr. Bormuth cited to the injection pressure limit for the Sunoco Inkster Facility well in support of his argument that the injection pressure limit for West Bay #22 SWD well is unsafe. Mr. Bormuth wrote:

[T]he EPA has previously determined that an injection pressure of 382 [pounds per square inch] is conservative and safe [for the Sunoco Inkster Facility well]. But for the West Bay #22 well, the EPA is allowing nearly double this injection pressure. So much for safety.

Petitioner Peter Bormuth's Reply to EPA Response to Petition for Review at 9. Accordingly, under the Board's Order remanding the West Bay #22 SWD permit, Region 5 must address Mr. Bormuth's argument that the injection pressure limit for West Bay #22 SWD is inconsistent with the injection pressure limit for the Sunoco Inkster Facility well, and in doing so, provide a rational basis for the limit chosen for the West Bay #22 SWD well. However, Region 5

accurately states that, prior to his Motion for Clarification, Mr. Bormuth had not supported this argument by relying on injection pressure limits Region 5 had established or proposed for the Haystead #9 and Moore #3-14 wells. Mr. Bormuth cannot use his Motion for Clarification as a vehicle to submit additional information into the record. Therefore, under the Board's Remand Order, the Region does not have to address Mr. Bormuth's new contention that the limits for the West Bay #22 SWD permit are inconsistent with the injection pressure limits for the Haystead #9 and Moore #3-14 wells.¹

Based on the foregoing discussion, the Board denies Mr. Bormuth's request for clarification that the Remand Order on the West Bay #22 SWD permit requires denial, termination, or revocation of other existing or proposed UIC permits. The Board also denies Mr. Bormuth's request for clarification on the scope of the technical issues on remand. The Board's Order clearly states that the Region must consider all of the arguments made by Mr. Bormuth in his public comments and pleadings on appeal.

So ordered.

ENVIRONMENTAL APPEALS BOARD

Dated: 8/31/16

By: Mary Kay Lynch
Mary Kay Lynch
Environmental Appeals Judge

¹ If on remand Region 5 were to reopen the public comment period on the permit under 40 C.F.R. § 124.14, Region 5 must, at the time of the final permit decision, respond to all significant comments filed that are within the scope of the reopened comment period. 40 C.F.R. § 124.17.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **ORDER RESPONDING TO MOTION FOR CLARIFICATION** in the matter of West Bay Exploration Company, UIC Appeal No. 15-03 were sent to the following persons in the manner indicated:

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Dated: 8/31/2016



Annette Duncan
Secretary