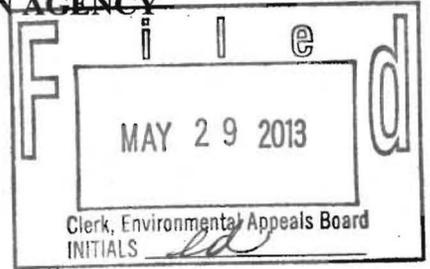


**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC**



In re:)
)
)

West Bay Exploration Co.)

UIC Appeal Nos. 13-01 & 13-02

UIC Permit No. MI-075-2D-0009)
)
)
_____)

ORDER DENYING RECONSIDERATION

On April 16, 2013, the Environmental Appeals Board (“Board”) dismissed with prejudice petitions filed by Peter Bormuth and Sandra K. Yerman challenging an Underground Injection Control (“UIC”) permit granted to West Bay Exploration Company (“West Bay”), Permit No. MI-075-2D-0009. *In re West Bay Exploration Co.*, UIC Appeal Nos. 13-01 & 13-02 (EAB Apr. 16, 2013) (Order Dismissing Petitions for Review as Moot). The Board concluded the case was moot because U.S. Environmental Protection Agency Region 5 (“Region”) had notified the Board that it had withdrawn this UIC permit in its entirety pursuant to 40 C.F.R. § 124.19(j). Petitioners have moved for the Board to reconsider its decision.

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). Petitioners argue that the Region committed a procedural error under 40 C.F.R. § 124.19(j) in withdrawing the permit without first seeking the Board’s permission and thus the Board should reconsider its decision to dismiss this

case as moot. The Board disagrees.

Under the regulatory review scheme for permits, a Region may withdraw a permit unilaterally prior to a fixed date in the course of a permit appeal, 40 C.F.R. § 124.19(j), and by motion subsequent to that date. *In re Desert Rock Energy Co., LLC*, PSD Appeal Nos. 08-03 through 08-06, slip op. at 19-20 (EAB Sept. 24, 2009) 14 E.A.D. ___ at __. Section 124.19(j) designates the period for unilateral withdrawal as “any time prior to 30 days after the Regional Administrator files its response to the petition for review * * *.” The purpose for this limitation on unilateral withdrawal of a permit that is being appealed is so that the Board may efficiently manage its docket. As EPA recently explained, limiting the period for unilateral withdrawal to “any time” prior to 30 days after the Region’s response “will continue to ensure that unilateral withdrawal of a permit will occur before the Board has devoted significant resources to the substantive consideration of an appeal.” 78 Fed. Reg. 5281, 5282 (Jan. 25, 2013). The preamble also confirmed that nothing in the new regulation was intended to bar the Region from requesting a voluntary remand of the permit from the Board at any time. *Id.*

In this permit appeal, Mr. Bormuth and Ms. Yerman filed their petitions on different dates: Mr. Bormuth on January 8, 2013, and Ms. Yerman on February 13, 2013. Both petitions were timely appeals of the Region’s December 6, 2012 permit decision because the 30-day period for filing appeals runs from the “service of notice of the Regional Administrator’s action” not the date of issuance, 40 C.F.R. 124.19(a) (2011) (revised March 26, 2013),¹ and Ms. Yerman

¹ This method for establishing the deadline for filing an appeal is unchanged in the revised rule. *See* 40 C.F.R. § 124.19(a)(3).

was not notified by the Region of its permit decision until January 9, 2013.² The Region's responses were due on February 25, 2013, to Mr. Bormuth's petition, and on April 9, 2013, to Ms. Yerman's petition. The Region filed a timely response to Mr. Bormuth's petition, on February 25, 2013. On April 8, 2013 - one day prior to the day its response to Ms. Yerman's petition was due - the Region unilaterally withdrew the West Bay permit in its entirety.

According to Petitioners, the Region's withdrawal came either too late (Mr. Bormuth) or too early (Ms. Yerman). Mr. Bormuth stresses that the Region withdrew the permit on April 8, 2013, which is 42 days after the Region's response to his petition - well outside the 30-day deadline for unilateral withdrawal allowed by section 124.19(j). On the other hand, Ms. Yerman argues that the Region was not authorized to withdraw the permit in conjunction with her petition because the withdrawal came before the Region had responded to her petition and thus was premature. But neither Petitioner offers any reason why the Region's purported procedural error resulted in the Board having made a "demonstrable error" in concluding this case was moot. Specifically, neither Petitioner provided a single plausible reason why, if the Region had filed a motion for voluntary remand, the Board should have denied it.³ Hence, Petitioners have not met

² Ms. Yerman's petition was delayed further because the Region instructed Ms. Yerman to file her petition with the Board at the Board's former address. Mr. Bormuth disputes the Region's conclusion that the Region did not provide notice to Ms. Yerman until January 9, 2013 and also claims that Ms. Yerman's petition was substantively flawed for failure to comply with certain pleading requirements in 40 C.F.R. § 124.19(a). Even if correct, these contentions do not affect when the Region's response was due to Ms. Yerman's petition, and thus they are irrelevant to the question of whether the Region complied with section 124.19(j).

³ Although Mr. Bormuth and Ms. Yerman have expressed an interest in obtaining a hearing on the merits of the withdrawn permit, the Board, following the traditional practice of United States federal courts, does not issue advisory opinions. *See Desert Rock Energy*, slip op. at 32, 14 E.A.D. at ___ (refusing to issue an advisory opinion regarding changes the Region might make to a permit that had been voluntarily remanded); *In re Cavenham Forest Indus., Inc.*

the high standard of showing demonstrable error.

Even if the Board were to assume, without deciding, that the Region should have filed a motion seeking a voluntary remand of the permit in the circumstances of this case, the Board finds no prejudice here from the failure to do so.⁴ In reviewing the Region's notice of withdrawal and deciding to dismiss this case as moot, the Board essentially treated the notice as a motion for voluntary remand, and after determining there was no docket management reason for retaining the case, summarily disposed of it. The Board notes that, in this case, the Region's actions to withdraw the permit came early in the proceeding, and there was no decision on the merits of the petitions at the time of the permit withdrawal. In fact, the Region had not even responded to the second petition, and so the Board was in no position to make any decision regarding review of the petitions. Thus, the Board's resources were not impacted by the Region's withdrawal of the permit. The Board has granted requests by the Regions for remand of permits even in cases much more advanced than the present litigation. In one case, the Board approved a request for voluntary remand after the Region had responded to all petitions for review, the Board had granted review, and briefing (other than surreply briefs) had been completed on the grant of review. *Desert Rock Energy*, slip op. at 4, 14 E.A.D. at ___.

5 E.A.D. 722, 731 n. 15 (EAB 1995) (stating, in permit appeal dismissed as moot, that the Board would not provide an advisory opinion "even if the request were properly before us"); *In re Simpson Paper Co.*, 4 E.A.D. 766, 771 n.10 (EAB 1993) (stating, in permit appeal dismissed as moot, that issuing an advisory opinion on a "hypothetical permit * * * is inconsistent with EPA's permit review authority").

⁴ To avoid any confusion in the future, the Board recommends that the Regions should not unilaterally withdraw a permit after the expiration of the 29-day period following their response to the earliest-filed petition. If a Region decides to withdraw the permit after the expiration of that 29-day period but prior to the expiration of the 29-day period applying to later-filed petitions, the Region should first request a voluntary remand of the permit by motion.

Moreover, this result is consistent with the liberality with which the Board treats motions for remand of permits, *id.* at 4, and the preference for permit decisions, especially decisions involving technical matters, to be decided in the first instance by the Region. *Id.* at 16-17. It would make little sense for the Board to insist on proceeding when the Region, on its own initiative, has decided the permit needs to be reexamined. *See id.* at 17-18 (“The federal courts have recognized the wisdom of granting remand motions because it allows an agency to correct its mistakes, thereby promoting good government and judicial efficiency.”).

Finally, as noted above, neither Petitioner is prejudiced by the Region’s withdrawal of the permit. The permit withdrawal terminates West Bay’s ability to construct the desired UIC well - the result sought by Mr. Bormuth’s and Ms. Yerman’s challenge to the West Bay permit. Should the Region decide to issue a revised draft permit to West Bay, Petitioners’ opportunities to contest that revised draft permit would in no way be restricted by the earlier permit withdrawal or the Board’s dismissal of their petitions for review. As EPA regulations make clear, following withdrawal of a permit by the Region, any new draft permit “must proceed through the same process of public comment and opportunity for a public hearing as would apply to any other draft permit subject to this part.” 40 C.F.R. § 124.19(j); *see* 40 C.F.R. §§ 124.10 - .12. If the Region does reissue a new draft permit to West Bay, and if the Petitioners are dissatisfied with the final permit that results from the public participation process, Petitioners once again may petition the Board for review. 40 C.F.R. § 124.19(a).

Accordingly, the Petitioners’ assertion that the Region followed an incorrect procedure in withdrawing the permit does not show that the Board demonstrably erred in concluding this case is moot and dismissing it. Should the Region decide to issue a new draft permit to West Bay,

Petitioners retain the ability to contest before the Region and the Board any objections they have to a revised permit. The Board can grant no effective relief to the Petitioners at this time. The motions for reconsideration are denied.

So ordered.

Dated:

May 29, 2013

ENVIRONMENTAL APPEALS BOARD⁵

By: 
Catherine R. McCabe
Environmental Appeals Judge

⁵ 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 Nos. 13-01 and 13-02, were sent to the following persons in the manner indicated:

By Certified Mail, Return Receipt Requested:

Peter Bormuth
142 W. Pearl St.
Jackson, MI 49201

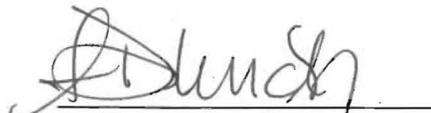
Sandra K. Yerman
6600 Riverside Dr.
Brooklyn, MI 49230

West Bay Exploration Company
13685 South West Bay Shore Drive
Suite #200
Traverse City, MI 49684

By Pouch Mail:

Kris P. Vezner
Assistant Regional Counsel
U.S. EPA, Region 5
77 W. Jackson Blvd. (C-14J)
Chicago, IL 60604

Dated: MAY 29 2013


Annette Duncan
Secretary