



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

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

ORDER DENYING MOTION FOR CLARIFICATION

The Environmental Protection Agency’s permit regulations allow individuals to file requests with EPA’s regional offices for termination of certain EPA-issued permits. 40 C.F.R. § 124.5(a). If the termination request is denied, the requestor may file an “informal appeal” of that denial with the Environmental Appeals Board. Id. § 124.5(b). Mr. Peter C. Bormuth filed such an informal appeal concerning his request that EPA Region 5 terminate an Underground Injection Control permit for a waste disposal well in Jackson County, Michigan. After briefing from the parties, we dismissed the informal appeal as premature. In re W. Bay Explor. Co., UIC Appeal No. 18-01 (EAB Apr. 26, 2018) (Order Dismissing Informal Appeal). Region 5 had not issued a final response denying the termination request. Further, even if it is assumed that in the absence of an actual denial there are circumstances under which an “effective denial” of a termination request can constitute a denial within the meaning of section 124.5(b), Mr. Bormuth did not show that the Region had effectively denied his request. Id. at 5-7.

Mr. Bormuth now moves for clarification of the Board’s dismissal order, asking that the Board specify when the Region must respond to his termination request. Petitioner Peter

Bormuth's Motion for Clarification Under 40 C.F.R. § 124.19(m), at 4 (May 10, 2018)<sup>1</sup> ("Mot. for Clarification"). He argues that a date for the Region's response is needed because the challenged well "endangers human health and/or the environment." *Id.* at 3. Responding to Mr. Bormuth's motion, the Region states that it "is evaluating the Petitioner's Request for Termination; intends to complete its analysis of the Petitioner's Request for Termination; and will issue a final decision on that request." EPA Region 5 Response to Motion for Clarification at 2 (May 16, 2018). In a reply brief, Mr. Bormuth restates his concern for "urgency" in the time allowed for the Region's response and also challenges section 124.5(b) as unconstitutionally vague for not explicitly stating the time frame for a Region's response to a permit termination request. Petitioner Peter Bormuth's Reply to Region 5 Response to Motion for Clarification under 40 C.F.R. § 124.19(m), at 2 (May 29, 2018). For the reasons below, we deny Mr. Bormuth's motion.

Mr. Bormuth is incorrect in describing his motion as seeking clarification of the Board's order. Mr. Bormuth does not request that the Board elucidate any aspect of our conclusion that Mr. Bormuth's informal appeal had been prematurely filed, the matter resolved in the order. *See W. Bay*, UIC Appeal No. 18-01, at 1 (dismissing Mr. Bormuth's appeal as premature). Rather, he has requested that the Board specify the point in the future at which a continued failure by the

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<sup>1</sup> Mr. Bormuth later filed a corrected version of his motion. Petitioner Peter Bormuth's Corrected Motion for Clarification Under 40 C.F.R. § 124.19(m) (May 21, 2018).

Region to respond to Mr. Bormuth's termination request would be considered an effective denial of that request. Mr. Bormuth writes:

[T]he Petitioner respectfully requests clarification on how long the Region may have to respond to the Petitioner's Request for Termination. It has been 17 months now since the EPA Region 5 received the Petitioner's request. Do they get 24 months? 36 months? More? At what point does their failure to respond constitute an effective denial?

Mot. for Clarification at 4. Yet, the Board rendered no holding on whether future actions or inaction by the Region might result in an effective denial; we held only that at present Mr. Bormuth had not demonstrated there had been an effective denial. *W. Bay*, UIC Appeal No. 18-01, at 6. Thus, Mr. Bormuth has not identified any part of the Board's order that requires clarification. *See* 40 C.F.R. § 124.19(m) (requiring that motions for clarification under section 124.19 "must set forth with specificity the portion of the decision for which clarification is being sought").

Instead of clarification, Mr. Bormuth appears to be seeking an advisory opinion on whether various hypothetical future situations constitute an effective denial. As noted, Mr Bormuth asks whether the lack of a decision by the Region on his termination request in twenty-four or thirty-six months, or longer, would be an effective denial.<sup>2</sup> However, "the Board,

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<sup>2</sup> Mr. Bormuth misconstrues the Board's order to the extent he is suggesting that a determination on whether a termination request has been effectively denied would be solely a factor of the length of time the request has been pending before the EPA regional office. In its order, while not deciding whether there are circumstances that would constitute an effective denial in the absence of an actual denial, the Board examined the totality of the circumstances bearing on the Region's intentions in determining whether there had been an effective denial of the termination request. *See W. Bay*, UIC Appeal No. 18-01, at 6-7; *see also In re Env'tl. Disposal Sys., Inc.*, UIC Appeal No. 07-01, at 3 (EAB July 11, 2007) (Order).

following the traditional practice of United States federal courts, does not issue advisory opinions.” *In re W. Bay Explor. Co.*, UIC Appeal Nos. 13-01 & 13-02, at 3 n.3 (EAB May 29, 2013) (Order Denying Reconsideration); *see In re Desert Rock Energy Co.*, 14 E.A.D. 484, 507 (EAB 2009) (refusing to issue an advisory opinion regarding changes the Region might make to a remanded permit); *In re Cavenham Forest Indus., Inc.*, 5 E.A.D. 722, 731 n.15 (EAB 1995) (stating, in a permit appeal dismissed as moot, that the Board would not provide an advisory opinion “even if the request were properly before us”). A motion for clarification does not provide a party with the opportunity to pose hypotheticals for the Board’s resolution or otherwise raise matters not before the Board. *See In re W. Bay Explor. Co.*, UIC Appeal No. 15-03, at 2 (Aug. 31, 2016) (rejecting as improper a motion requesting clarification on how a Board decision impacted Underground Injection Control well permits that were not the subject of the Board’s order); *In re Simpson Paper Co.*, 4 E.A.D. 766, 771 n.10 (EAB 1993) (stating that issuing an advisory opinion on a “hypothetical permit \* \* \* is inconsistent with EPA’s permit review authority”).<sup>3</sup>

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<sup>3</sup> Mr. Bormuth’s challenge to the constitutionality of section 124.5(b), the regulation under which he brought this appeal, is not the type of claim that may be appropriately raised to the Board. Under part 124, “[t]he Board is charged with reviewing permitting decisions and determining whether the permitting authority has acted in accordance with Agency regulations, not with reviewing those underlying Agency regulations.” *In re Archer Daniels Midland Co.*, 17 E.A.D. 380, 392 (EAB 2017); *In re FutureGen Indus. All.*, 16 E.A.D. 717, 724 (EAB 2015).

The motion for clarification is denied.

So ordered.<sup>4</sup>

**ENVIRONMENTAL APPEALS BOARD**

Dated: May 31, 2018

By:   
Kathie A. Stein  
Environmental Appeals Judge

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<sup>4</sup> 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 DENYING MOTION FOR CLARIFICATION** 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:

**By U.S. First Class Mail:**

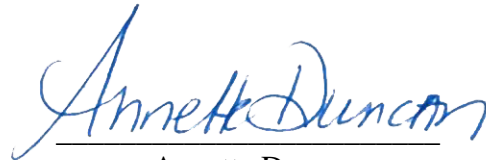
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Dated: May 31, 2018



Annette Duncan  
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