UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5
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NOV 25 2019

REPLY TO THE ATTENTION OF
C-14J

By Electronic Mail

Ms. Eurika Durr, Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
1201 Constitution Avenue, NW
WJC East Building, Room 3334
Washington, DC 20004

Re: Muskegon Development Company – UIC Class II Well Permit No. MI-035-2R-0034 – UIC Appeal No. 19-02 – EPA Region 5's Response to Petition for Review

Dear Ms. Durr:

Please find enclosed for e-filing, in the docket of the above-referenced case, the following: EPA Region 5's Response to Petition for Review and Attachments by the Attorney of Record in this case.

Please feel free to contact me with any questions or comments.

Respectfully Submitted

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

In re:	)	
	)	
Muskegon Development Company	)	UIC Appeal No. 19-02
Mount Pleasant, Michigan	)	
Holcomb 1–22 Facility	)	
	)	
Underground Injection Control	)	
Permit No.: MI-035-2R-0034	)	
	)	

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Attachment 1: Revised Response to Comments Dated September 26, 2019 for Draft Class II Permit Re-Issued to Muskegon Development Company (MDC), Permit No. MI-035-2R-0034

Attachment 2: Copy of Reissued September 26, 2019 Permit No. MI-035-2R-0034

Attachment 3: Certified Administrative Record for Revised Response to Comments/Permit No. MI-035-2R-0034

STATEMENT OF COMPLIANCE WITH WORD LIMITATION

This brief complies with the 14,000-word limitation found at 40 C.F.R. § 124.19(d)(3). *See* 40 C.F.R. § 124.19(d)(1)(iv).

I. INTRODUCTION

The U.S. Environmental Protection Agency ("EPA"), Region 5 ("Region"), hereby responds to the Petition for Review filed on October 25, 2019 ("Petition") with the Environmental Appeals Board ("EAB" or "Board") by Emerson Joseph Addison III ("Petitioner"). The Petition appears to be challenging the Region's reissuance of Permit No. MI-035-2R-0034 for a Class II Underground Injection Control ("UIC") well for enhanced oil recovery in Clare County, Michigan.[1] The Region reissued this Permit with a revised Response to Comments ("RtC") to address the four comment responses identified as needing clarification in the Board's April 29, 2019 Order Remanding in Part and Denying Review in Part ("Remand Order"). *In re Muskegon Dev. Co.*, 17 EAD 762 (EAB 2019). For the reasons set forth below, EPA respectfully requests that the Board deny review of the reissued Permit, as the Petition fails to demonstrate that the Region's responses to these four comments is clearly erroneous or otherwise warrants review, as required by 40 C.F.R. § 124.19(a)(4). Moreover, to the extent that the Petition raises issues other than those addressed in the four revised comments, such issues are not subject to Board review in the current proceeding. *See* Remand Order at 762, n. 11 ("Anyone dissatisfied with the Region's decision on remand must file a petition seeking Board review in order to exhaust administrative remedies under 40 C.F.R. § 124.19(*l*). Any such appeal shall be limited to issues the Region addresses on remand.")

[1] As noted in the Region's Reply of November 20, 2019 to Petitioner's Response to Order to Show Cause Why Petition Should Not Be Dismissed for Lack of Jurisdiction, Petitioner does not attach or clearly reference the permit decision that he is challenging in this appeal.

II. LEGAL FRAMEWORK

A. Safe Drinking Water Act (SDWA) and UIC regulations

Congress enacted the SDWA in 1974 to ensure that the Nation's sources of drinking water are protected against contamination and "to prevent underground injection which endangers drinking water sources." 42 U.S.C. § 300h(b). Part C of the SDWA, 42 U.S.C. §§ 300h to 300h-8, is designed to protect underground sources of drinking water ("USDWs") from contamination caused by the underground injection of fluids. Among other things, the SDWA directed EPA to promulgate permit regulations containing minimum requirements for State UIC programs. 42 U.S.C. § 300h. EPA's regulations implementing the UIC program are contained in 40 C.F.R. Part 144-147. Part 144 establishes the regulatory framework, including permitting requirements, for EPA-administered UIC programs. Part 146 sets out technical criteria and standards that must be met in permits. Procedural requirements applicable to UIC permits are found in 40 C.F.R. Part 124.

The UIC regulations classify wells into six classes. *See* 40 C.F.R. §§ 144.6, 146.5. The permit at issue in this appeal is for a Class II well. A "Class II" well is defined as:

> Wells which inject fluids: (1) Which are brought to the surface in connection with natural gas storage operations, or conventional oil or natural gas production and may be commingled with waste waters from gas plants which are an integral part of production operations, unless those waters are classified as a hazardous waste at the time of injection. (2) For enhanced recovery of oil or natural gas; and, (3) For storage of hydrocarbons which are liquid at standard temperature and pressure. *Id.*

In states without an approved UIC program, EPA directly implements the UIC regulations and issues permits. The State of Michigan has not received approval to implement the UIC Class II program; therefore, the Region is the permitting authority for Class II wells in Michigan. *See* 40 C.F.R. §§ 147.1150 – 147.1155.

B. Consideration of Environmental Justice Under the SDWA

On February 11, 1994, President William Clinton signed Executive Order 12898, "Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations" ("EO 12898"). 59 Fed. Reg. 7629 (February 16, 1994). EO 12898 states in part:

> To the greatest extent practicable and permitted by law, and consistent with the principles set forth in the report on the National Performance Review, each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States . . . . [EO 12898, § 1-101]

As the Board has explained, there are "substantial limitations" on implementation of the EO in the permitting context, as by its express terms, it may be implemented only in a "manner that is consistent with existing law." *In re Envotech*, 6 E.A.D. 260, 279 (EAB 1996) (quoting *Chemical Waste Management of Indiana*, 6 E.A.D. 66 (EAB 1996)). The Board has "consistently interpreted the Agency's permitting role under the UIC program as being limited to implementing the SDWA and UIC regulations promulgated under the SDWA," finding that "the Agency has no authority to deny or condition a permit where the permittee has demonstrated full compliance with the statutory and regulatory requirements." *Id.* at 280. Accordingly, the Board has specifically concluded that "if a UIC permit applicant meets the requirements of the SDWA and UIC regulations, the 'Agency *must* issue the permit, regardless of the racial or socio-economic composition of the surrounding community and regardless of the economic effect of the facility on the surrounding community'." *Id.* at 280-281 (quoting *Chemical Waste Mgmt*, 6 E.A.D. at 73 (emphasis in original)).

However, according to the Board, there are two limited areas in the UIC permitting scheme in which the Region has discretion to consider environmental justice issues: in ensuring

public participation under Part 124 regulations, and under the UIC regulatory omnibus authority in 40 C.F.R. § 144.52. Regarding UIC omnibus authority, the Board has noted that "any exercise of discretion under the UIC omnibus authority is 'limited by the constraints that are inherent in the language' of the authority." *Envotech,* 6 E.A.D. at 281. The Board has further explained that "in response to an environmental justice claim, the Region is limited to ensuring the protection of the USDWs upon which the minority or low-income community may rely" and that "[t]he Region would not have the authority to redress impacts unrelated to the protection of underground sources of drinking water, such as alleged negative economic impacts on the community, diminution in property values, or alleged proliferation of local undesirable land uses." *Id.* at 281-282.

III. FACTUAL AND PROCEDURAL BACKGROUND

The Region originally issued a permit to Muskegon Development Company ("MDC") on July 3, 2018, for the operation of a Class II UIC well (Holcomb 1-22) for injection of fresh water for enhanced oil recovery in Clare County, Michigan. On August 10, 2018, Petitioner filed a petition for review of the permit. On April 29, 2019, as noted above, the EAB issued a narrow remand of the permit with respect to four comment responses, and otherwise denied review. The Board specifically remanded the permit for the Region to (1) provide explanation in comment 20 as to whether and how the Region exercised its discretion to consider environmental justice under the UIC permitting program through public participation and its regulatory omnibus authority (Remand Order at 756); and (2) to provide responses to comments 24, 25 and 26, as the Board was unable to determine from the previous RtC whether the Region had addressed these particular comments (Remand Order at 752).

Pursuant to the Remand Order, the Region addressed the four comments in a revised RtC. The Region concluded that "the comments did not raise significant issues to modify EPA's determination that the permit application and draft permit met federal Underground Injection Control (UIC) requirements." [Region 5 Final Permit Cover Letter, p. 1, September 26, 2019.] Accordingly, on September 26, 2019, the Region reissued the UIC Class II permit MI-035-2R-0034 ("Permit") that included the revised RtC. The Region also issued a revised Administrative Record ("AR"),[2] in support of the reissued Permit. (A copy of the revised RtC is submitted as Attachment 1, and a copy of the final Permit is submitted as Attachment 2. A copy of the revised AR is submitted as Attachment 3.)

On October 25, 2019, Petitioner filed the Petition with the Board seemingly challenging the reissued Permit. (This lack of clarity was also noted by the Board.) Petitioner objects to the Region's four responses to comments addressing the Remand Order. The Region addresses Petitioner's arguments with respect to each of these comment responses in turn below.

IV. STANDARD OF REVIEW

In considering any petition filed under 40 C.F.R. § 124.19(a), the Board first evaluates whether Petitioner has met threshold procedural requirements. *See* 40 C.F.R. § 124.19(a)(2) -(4); *see also In re MHA Nation Clean Fuels Refinery*, 15 E.A.D. 648, 652 (EAB 2012) (citing *In re Beeland Group, LLC*, 14 E.A.D. 189, 194-195 (EAB 2008)). If the Board concludes that a petitioner satisfies all threshold pleading obligations, only then does the Board evaluate the merits of the petition for review. *In re Seneca Resources Corp.*, UIC Appeal Nos. 14-01 through 14-03

[2] The revisions to the AR consisted of adding to the record a study referenced by Petitioner in his comments on the draft permit (Anthony Ingraffea, "Fluid Migration Mechanisms Due to Faulty Well Design and/or Construction: An Overview and Recent Experiences in the Pennsylvania Marcellus Play"), and renumbering the record to account for this addition.

at 2 (EAB May 29, 2014) (Order Denying Review) (citing *In re Indeck-Elwood, LLC*, 13 E.A.D. 126, 143 (EAB 2006)). If a petitioner fails to meet a threshold requirement, the Board typically denies or dismisses the petition for review. *See, e.g., In re Cherry Berry B1-25 SWD*, UIC Appeal No. 09-02 at 3 (EAB August 13, 2010) (concluding petition did not articulate any specific permit conditions for review); *In re Russell City Energy Ctr. LLC*, PSD Appeal Nos. 10-12 and 10-13 at 7 (EAB June 9, 2010); *In re Presidium Energy, LLC*, UIC Appeal No. 09-01 at 5 (EAB July 27, 2009) (concluding petition lacked required specificity); *Beeland* at 4, 10-11 (concluding that petitions lacked specificity); *In re Sammy Mar, LLC*, UIC Permit Appeal 15-02 at 12-13 (EAB February 16, 2016); and, *see also In re Envotech, LP*, 6 E.A.D. 260, 265-69 (EAB 1996) (dismissing multiple petitions on threshold grounds including specificity).

In any appeal from a permit decision issued under Part 124, Petitioner bears the burden of demonstrating that review is warranted. 40 C.F.R. § 124.19(a)(4). Petitioner bears that burden even when Petitioner is unrepresented by counsel (or pro se), as in the case here. *In re Shell Gulf of Mexico, Inc. & Shell Offshore, Inc.*, 15 E.A.D. 470, 478 (EAB 2012) (citing *In re Sutter Power Plant*, 8 E.A.D. 680, 687 & n.9 (EAB 1999). While the Board "does not expect such petitions to contain sophisticated legal arguments or to employ precise technical or legal terms," the Board nevertheless "does expect such petitions to provide sufficient specificity to apprise the Board of the issues being raised." *Sutter*, 8 E.A.D. at 687-88; *accord In re Puerto Rico Electric Power Authority*, 6 E.A.D. 253, 255 (EAB 1995).

To the extent a petitioner challenges an issue the permit issuer addressed in its response to comments, Petitioner must provide a record citation to the comment and response and also must explain why the permit issuer's previous response to those comments was clearly erroneous or otherwise warrants review. *See* 40 C.F.R. § 124.19(a)(4); *Cherry Berry* at 5 (citing eight Board

decisions); *see also In re Sierra Pacific Industries*, PSD Appeal Nos. 13-01 through 13-04 at 19-20 (EAB July 18, 2013).

The Board has consistently denied review of petitions that merely cite, attach, incorporate, or reiterate comments previously submitted on the draft permit. *See e.g., In re City of Pittsfield,* NPDES Appeal No. 08-19 (EAB Mar. 4, 2009) *aff'd*, 614 F.3d 7, 11-13 (1st Cir. 2010); *In re Knauf Fiber Glass, GmbH,* 9 E.A.D. 1, 5 (EAB 2000) ("Petitions for review may not simply repeat objections made during the comment period; instead they must demonstrate why the permitting authority's response to those objections warrants review."); *In re Pennsylvania General Energy Co., LLC,* UIC Appeal Nos. 14-63 through 14-65, at 18 (EAB August 21, 2014); *Beeland* at 195-6.[3]

On permit decisions, the Board generally defers to the permit issuer. *In re Puna Geothermal Venture*, UIC Appeal Nos. 99-2 through 99-5 at 246 (EAB June 27, 2000) (As the Board has stated on numerous occasions, the Board's power of review should be 'sparingly exercised.' (citations omitted)); *In re FutureGen Industrial Alliance, Inc.*, UIC Appeal Nos. 14-68 to 14-71 at 5 (EAB April 28, 2015) (In considering whether to grant or deny review of a permit decision, the Board is guided by the preamble to the regulations authorizing appeal under Part 124, in which the Agency stated that the Board's power to grant review "should be only sparingly exercised," and that most permit conditions should be finally determined at the [permit issuer's] level." (citations omitted)).

[3] In *Seneca Resources.* at 7 fn. 4, the Board discusses that "Federal circuit courts of appeal have consistently upheld the Board's threshold requirements, "including the requirement that a petitioner must substantively confront the permit issuer's response to the petitioner's previous objections," and provides numerous case citations.

"When evaluating a challenged permit decision for clear error, the Board examines the administrative record that serves as the basis for the permit to determine whether the permit issuer exercised his or her 'considered judgment.'" *In re West Bay Exploration Co.*, UIC Appeal No. 15-03 at 6 (EAB July 26, 2016); *See e.g., In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 191, 224-25 (EAB 2000); *In re Ash Grove Cement Co.,* 7 E.A.D. 387, 417-18 (EAB 1997). "The permit issuer must articulate with reasonable clarity the reasons supporting its conclusion and the significance of the crucial facts it relied on when reaching the conclusions. As a whole the record must demonstrate that the permit issuer 'duly considered the issues raised in the comments' and ultimately adopted an approach that 'is rational in light of all information in the record.'" *West Bay* at 6 (citations omitted). The Board will uphold a permitting authority's reasonable exercise of discretion if that decision is "cogently explained and supported in the record." *FutureGen* at 5-6 (citations omitted).

V. ARGUMENT

As discussed below, Petitioner has failed to demonstrate that the Region's decisions were based on clear error of law or fact or raise exercise of discretion or important policy considerations that merit Board review. The Board should therefore deny review of the Petition.

Petitioner Fails to Demonstrate That the Region's Response to Comment 20 is Clearly Erroneous or Otherwise Warrants Review

The Region disagrees with Petitioner's assertions that it issued "inadequate" responses to Comment #20 on remand. *See* Petition at 10. The Region addressed the Remand Order by explaining in the revised RtC whether and how it exercised its discretion to consider environmental justice, including consideration of the low-income population in the community, in the two areas in which it has the discretion to do so: through enhanced public participation and use of its regulatory omnibus authority in 40 C.F.R. § 144.52. *See* Remand Order at 756.

Specifically, with respect to public participation, the Region explained that it went beyond the requirements of 40 C.F.R. Part 124, allowing for two comment periods, an additional public meeting, and an extension of the comment period to meet the needs of the community. With respect to its omnibus authority, the Region explained that it did not exercise its discretion to include additional conditions under this authority, based on its determination that "conditions in the final permit will effectively protect the USDWs upon which the low-income portion of the community relies." RtC at 15.

Petitioner does not address or raise any objection with respect to the Region's explanation regarding public participation. To the extent that Petitioner is challenging the Region's exercise of discretion under its omnibus authority, Petitioner fails to demonstrate that the Region clearly erred or abused its discretion in not including additional permit conditions based on its determination that the permit conditions will protect against endangerment of the USDWs upon which the community relies. Petitioner simply restates his generalized concerns that "these wells are dangerous" (Petition at 10), without adequately confronting the Region's comment response detailing the many permit conditions designed to prevent against such endangerment. As explained in the revised RtC, the proposed injection well is for injection of fresh water (ground water), the well is designed with multiple barriers (multiple steel well casings, cement between casings, injection through steel tubing, annulus fluid to monitor and contain any future leaks from the tubing), and the geology of the well site contains multiple formations of impermeable rock to prevent upward migration of any fluid leaks. See revised RtC Responses #10, 12 (AR 18), and Permit at Part II.A, Part II.B.1.d, Part III.B (AR 7). As detailed in the RtC, the Region protected against endangerment of USDWs through various technical determinations and permit conditions, including:

- analyzing the proposed well's geologic siting, to determine the appropriately protective injection zone and confining zone and only authorizing injection into that injection zone. See revised RtC at 5 (AR 10); Permit Page 1 and Part II.A.1 (AR 7)

- imposing permit conditions regarding well construction, including as to well casing and cementing. See revised RtC at 12, 14 (AR 18); Permit at Part II.A, Part III.B (AR 7)

- analyzing the proposed well's construction, including the "engineering design of the injection well and cement plug." See revised RtC at 10, 11 (AR 18)

- imposing permit conditions regarding monitoring, observing, recording and reporting various parameters of well operation and injectate characteristics. See revised RtC at 14, 18, 23 (AR 14); Permit at Part I.E.8, Part I.E.9.c, Part II.B.2, Part II.B.3, and Part III. A (AR 7).

- imposing permit conditions regarding periodically testing the well's mechanical integrity. See revised RtC at 5, 6, 17, 23 (AR 18); Permit at Part I.E.17 (AR 7)

- imposing permit conditions that require ceasing injection and notifying Region 5 if the permittee's monitoring uncovers any leak in the well. See revised RtC at 5, 6 (AR 18); Permit at Parts I.E.9.e. I.E.16 (AR 7)

- reviewing surrounding wells to ensure that no area wells could provide a channel for injectate to migrate above the confining zone. See revised RtC at 10, 11, 19 (AR 17)

- establishing a safe maximum injection pressure. See revised RtC at 9 (AR 13); Permit at Parts II.B. 1 .a, II.B.1.b, III.A (AR 7)

- evaluating the injectate's composition and other characteristics. See revised RtC at 8, 22 (AR 1); Permit at Part III.A (AR 7)

- evaluating area seismicity. See revised RtC at 15, 16, 17 (AR 23)

- requiring a plugging and abandonment plan dictating how the well must be closed. See Permit, Part III.B (AR 7).

- requiring that "the underground injection activity, otherwise authorized by this permit or rule, shall not allow 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 pursuant to 40 C.F.R. Part 142 or may otherwise adversely affect the health of persons" Permit at Part I.A (AR 7)

- requiring the proper operation and maintenance of the well, including effective performance, adequate funding, adequate operator staffing and training and adequate laboratory and process controls. See Permit at Part I.E.5 (AR 7)

- requiring that before beginning injection, the permittee must provide regulators a chance to inspect the well. See Permit at Part I.E.10 (AR 7)

Petitioner dismisses these safeguards as "bureaucratic regulation and technical specifications," without explaining why these technical regulatory requirements are not sufficient to protect against endangerment. Petitioner simply points to a study of wells in the Marcellus Shale in Pennsylvania, indicating that this study – along with "data from numerous other studies" that are not identified in the Petition – "clearly indicates that these wells often leak." Again, such generalized assertions are not sufficient to overcome "the heavy burden a petitioner must bear to show that the permit issuer clearly erred in this technical area." *In re Jordan Development Co.,* 18 E.A.D. ___ (EAB August 8, 2019), *slip op.* at 22. Here, the Region explained in the RtC that the injection activity discussed in the referenced study is sufficiently different from the permitted activity (lack of high-pressure fracking; injection of fresh water only), and detailed the basis for its site-specific findings that the injection activity authorized in the reissued permit would not endanger USDWs. RtC at 19. On matters that are fundamentally technical or scientific in nature, the Board typically defers to a permit issuer's technical expertise and experience, as long as the permit issuer adequately explains its rationale and supports its reasoning in the administrative record. *See In re Dominion Energy Brayton Point, L.L.C.*, 12 E.A.D. 490, 510, 561-62, 645-47, 670-74 (EAB 2006).

In essence, Petitioner's real challenge here is to the sufficiency of the applicable UIC regulations. Petitioner is not arguing that the permit conditions fail to meet the regulatory requirements, or even that the Region failed to appropriately exercise its discretionary authority under the regulations, but rather that the regulations themselves are "wildly insufficient, ambiguous,...nearly impossible to enforce," and "based on questionable science." Petition at 8.

The Board has consistently held that petitioners cannot challenge the underlying regulations in the context of a permit appeal. *See Jordan Development Co.*, 18 E.A.D.__ (EAB August 8, 2019), *slip op.* at 12 (finding that petitioner's request for a change to UIC regulations was outside the scope of Board review); *In re Archer Daniels Midland Co.*, 17 E.A.D. 380, 404-05 (EAB 2017) (holding that " the Board is not an appropriate forum in which to adjudicate objection to UIC regulation"); *In re FutureGen Indus. All., Inc.*, 16 E.A.D. 717, 724 (EAB 2015) (denying review because Board is not appropriate forum to decide challenges to structure of UIC regulations and policies underlying them), *pet. for review dismissed as moot sub nom DJL Farm L.L.C. v. EPA*, 813 F.3d 1048 (7th Cir. 2016).

Here, contrary to Petitioner's unfounded assertion, the Region did not decide that it is "OK to risk poisoning the community a little bit" or define the acceptable levels of risk to this particular community in the context of issuing this permit. *See* Petition at 9-10. Rather, the record reflects that the Region applied the UIC Class II regulatory requirements, and concluded that the permit conditions meet such requirements, including preventing endangerment of USDWs, with respect to any community that relies on it. See RtC at 14 ("The final Permit includes conditions necessary to protect against endangerment of USDWs, including any upon which the local low-income community relies"); RtC at 15 ("the Permit application and conditions in the final Permit will effectively protect the USDWs upon which the low income portion of the community relies"); RtC at 16 ("the final permit includes the conditions needed to prevent endangerment of USDWs"); *Id* ("the issuance of the UIC Class II Permit to Muskegon would not result in a threat to protection of the USDWs upon which the affected EJ community (as well as the overall community) relies").

As the Board noted in *Envotech*, "the SDWA proscribes *all* 'underground injection which endangers drinking water sources,' regardless of the composition of the community surrounding the proposed injection site." *Envotech*, 6 E.A.D at 281 (citing SDWA § 1421(b)(1), 42 U.S.C. § 300h(b)(1)). Accordingly, because the Permit included conditions implementing the statutory and regulatory non-endangerment requirements that apply to all USDWs, Region 5 did not clearly err or abuse its discretion in not including additional permit conditions under its regulatory omnibus authority. *See Jordan Development Co.*, 18 E.A.D. __ (EAB August 8, 2019), *slip op.* at 17, (finding that Region reasonably exercised its discretion in concluding not to conduct a further analysis under its omnibus authority where, as here, the Region made technical determinations that the proposed permit conditions were otherwise sufficient to protect USDWs and the public health, regardless of the composition of the community surrounding the well site).

Finally, the Board should reject Petitioner's argument that the Region's response to Comment 20 is inadequate because the Region failed to address the issue of water withdrawal (Petition at 10), as the Board has previously held that this argument was outside the scope of the SDWA and UIC permitting program. *See* Remand Order at 758. Moreover, this issue is outside the scope of the Board's Remand Order with respect to Comment 20, which was limited to consideration of environmental justice in public participation and under the omnibus authority, and therefore cannot be addressed in this appeal. See Remand Order at 762, n.11 (any appeal "shall be limited to issues the Region addresses on remand.")

<u>Petitioner Fails to Demonstrate that the Region's Response to Comment 24 on Remand is Clearly Erroneous or Otherwise Warrants Review</u>

The Region disagrees with Petitioner's assertion that, on remand, the Region's response to Comment 24 regarding the potential risk of well casing failure is "inadequate." *See* Petition at

11. The Region fully considered Petitioner's arguments about potential well casing failure, and included conditions in the reissued Permit consistent with the regulatory requirements to prevent against such failure. *See e.g.,* Permit at Part I.E.17 ("the permittee must establish (prior to receiving authorization to inject), and shall maintain mechanical integrity of this well, in accordance with 40 CFR § 146.8"). The revised RtC explains that the Permit requires the permittee to demonstrate mechanical integrity, including "no significant leak in the casing"; that the pressure of the annulus fluid is used to monitor for any leakage in the casing; that the annulus pressure, multiple well casings, and cement between casings provide a barrier to contain any leaks; that mechanical integrity testing is required every 5 years or when certain conditions occur, and can be required by the Region at any time; that in the event of any loss of mechanical integrity, the permittee must cease injection, notify EPA within 24 hours and pass another mechanical integrity test before resuming operations. *See* RtC at 19-20. *See also* , RtC at 7-8, 10, 12

Petitioner's argument rests heavily on the same study of wells in the Marcellus Shale in Pennsylvania (2012 report by Anthony R. Ingraffea, PhD, AR 93), which Petitioner argues "casts doubt over EPA claims of safety." Petition at 12. However, as discussed above, the RtC reflects that the Region has considered this study, and concluded that the injection activity discussed therein is sufficiently different from the permitted activity (lack of high pressure hydraulic fracturing; injection of only fresh water), and that the conditions in this Permit are consistent with regulatory requirements to prevent against risk of endangerment of USDWs due to well casing failure. Moreover, the Region has explained that its determination here is based on site-specific findings and local geology, including the "extremely rare" incidents of casing leaks in Michigan (ranging from 0% to 0.28% per year). RtC at 20. Petitioner's reliance on a

generalized study of well failures involving different injection activity in another part of the country are not sufficient to overcome the Region's considered technical judgment based on site-specific geology and information. See *Jordan Development Co.*, 18 E.A.D. __ (EAB August 8, 2019), *slip op.* at 2. "In technical matters such as this one involving injection well leaks and casing failures, the Board generally defers to the permit issuer's technical expertise." *Id* at 38 .

Petitioner's additional argument based on alleged self-reporting deficiencies in the oil and gas industry should also be rejected, as it falls outside the bounds of the UIC regulatory permitting program. In numerous prior cases, the Board "has made clear that its authority to review UIC permit decisions extends to the boundaries of the UIC permitting program itself, with its SDWA-directed focus on the protection of USDWs, and no farther." *Jordan Development Co.,* 18 E.A.D.__ (EAB August 8, 2019), *slip op.* at 26, quoting *In re Envtl. Disposal Sys.*, 12 E.A.D. 254, 266 (EAB 2005) (citing cases). In fact, in a challenge brought by Petitioner to another Class II UIC permit, the Board specifically held that it lacked jurisdiction to consider similar issues regarding purported well failure rate, reporting deficiencies, EPA UIC program oversight, and the permittee's compliance history. *See id.* As the Board observed, the UIC regulations at 40 C.F.R. § 146.24 "specify which factors EPA must consider in evaluating a UIC permit application. * * * EPA cannot deny or issue [the] permit application based on issues outside of the site-specific factors allowed in regulations." *Id.* Because any alleged self-reporting deficiencies in the oil and gas industry are outside of the specified factors for consideration under the UIC regulations, the Board should similarly reject this argument based on lack of jurisdiction. *See Jordan Development Co.*, 18 E.A.D. __ (EAB August 8, 2019), *slip op.* at 26, (finding lack of jurisdiction to review "matters [that] are not oriented exclusively toward the protection of underground sources of drinking water.") *In re Am Soda, L.L.P.*, 9

E.A.D. 280, 286 (EAB 2000) (holding that UIC program authorizes Board to review UIC permitting decisions only to extent those decisions affect well compliance with SDWA and applicable UIC regulations).

EPA again notes that Petitioner's real challenge here appears to be to the regulations themselves, which specifically allow for the issuance of Class II UIC permits that include conditions meeting the regulatory requirements. Petitioner's argument that this Permit should not be issued due to potential well failure or lack of sufficient science essentially amounts to an attack on the sufficiency of the regulations themselves, a challenge that cannot be brought in the context of an EAB permit appeal. *See supra* at 12-13.

Petitioner Fails to Demonstrate That the Region's Response to Comment 25 is Clearly Erroneous or Otherwise Warrants Review

Petitioner asserts that, on remand, the Region's response to Comment 25 is "inadequate," and that the Permit should be denied, again on account of the potential risk of well failure. The Board should reject this argument for the same reasons discussed with respect to Comment 24 above, and set forth in more detail below.

First, the record reflects that the Region fully considered Petitioner's comment and studies submitted with respect to well failure and included permit conditions consistent with the regulatory requirements to prevent against such failure. *See* RtC at 20-21 (describing well construction requirements in the permit to ensure mechanical integrity). The revised RtC also explains that the studies submitted by Petitioner do not reflect the Region's experience with respect to well failure in Michigan, that the well failure rate in Michigan has been no higher than 5% in any given year, that such failures have consisted almost entirely of annulus fluid rather

than injectate into nontarget areas, and that casing leaks of injectate fluid into nontarget areas are "extremely rare" in Michigan. RtC at 20.

Again, Petitioner does not confront the Region's response to comment to explain why the Region's site-specific technical findings and safeguards in the permit are inadequate, but simply points to the Ingraffea study to show the alleged under-reporting of well failures. However, the Board has specifically held that it lacks jurisdiction to consider purported well failure rates in its review of UIC permit decisions. *See Jordan Development Co.*, 18 E.A.D. __ (EAB August 8, 2019), *slip op.* at 26 (rejecting on jurisdictional grounds Petitioner's argument regarding alleged under-reporting of well failures in a challenge to another Class II UIC permit). Even if the purported well failures and under-reporting of such failures could be considered, the generalized statements in the Ingraffea study cannot be sufficient to overturn the Region's site-specific technical determinations that the permit conditions are consistent with regulatory requirements to prevent against such failure. *See Jordan Development Co.*, 18 E.A.D. __(EAB August 8, 2019), *slip op.* at 37-38, (deferring to the Region's site-specific technical determinations regarding well failure rates in Michigan).

Finally, as with respect to Comment 24, Petitioner's argument that this Permit should not be issued due to potential risk of well failure appears to be challenging the sufficiency of the underlying UIC regulations, which specifically allow for the issuance of Class II permits that include conditions meeting the regulatory requirements. As the Board has held, the Board is not the proper forum for such a challenge. *See supra* at 12-13.

Petitioner Fails to Demonstrate that Region's Response to Comment 26 on Remand is Clearly Erroneous or Otherwise Warrants Review

The Board should reject Petitioner's challenge with respect to Comment 26 because Petitioner raises arguments regarding the Region's oversight of Class II UIC wells that are outside the scope of the Board's authority to address in the context of a UIC permit appeal. As the Board has previously held, it lacks jurisdiction to consider EPA UIC program oversight and a permittee's compliance history. *See supra* at 16-17. *See also In re Envotech, L.P.*, 6 E.A.D. at 260, 273-74 (EAB 1996) ("the Board has no jurisdictional basis to review a permit based solely on a permittee's past compliance history.") Once more, this is an example of Petitioner's challenge really being directed at whether the UIC Class II regulatory requirements are sufficient to prevent endangerment of USDWs. *See* Petition at 14 (rejecting EPA's response because it "assumes that the regulations are adequate"). As previously explained, that issue cannot be raised in the context of an EAB permit appeal. *See supra* at 12-14.

IV. CONCLUSION

For the reasons set forth above, EPA respectfully requests that the Board deny this Petition for Review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "EPA Region 5's Response to Petition for Review", and Attachments in the matter of Muskegon Development Company Class II Well Permit No. MI-035-2R-0034, UIC Appeal No. 19-02, were sent electronically to the following persons, on the date below:

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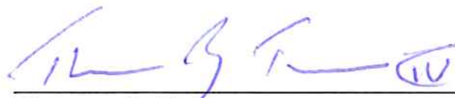
DATED: November 25, 2019



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