



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

FEB 21 2020

By Electronic Mail

REPLY TO THE ATTENTION OF

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

C-14J

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 Order Directing Clarification

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 the EAB's February 11, 2020 Order Directing Clarification by the Attorney of Record in this case.

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

Respectfully Submitted

A handwritten signature in blue ink, appearing to read "Thomas P. Turner".

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Enclosure

cc:

By electronic filing to:

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

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

UIC Appeal No. 19-02

EPA REGION 5's RESPONSE TO ORDER DIRECTING CLARIFICATION

TABLE OF ATTACHMENTS

Attachment 1: October 2, 2019 e-mail message to commenters

Attachment 2: Response to Comments cover transmittal (“Tanaka letter”) signed September 26, 2019

Attachment 3: Transmittal letter for final permit, signed September 26, 2019 (to Muskegon Development Company)

Attachment 4: Revised Response to Comments, signed September 26, 2019

Attachment 5: Mail list compiled from mailed and e-mailed comments

Attachment 6: Certificate of Service (October 2, 2019)

Attachment 7: Class II underground injection final permit (September 26, 2019) (to Muskegon Development Company)

Attachment 8: EPA Region 5 UIC Standard Operating Procedure (SOP) for Public Participation.

Attachment 9: 40 CFR Part 124.15

Attachment 10: Results of February 13 and 18, 2020 internet searches of publicly available Region 5 Hearing documents (re: Permit #MI-035-2R-0034).

STATEMENT OF COMPLIANCE WITH WORD LIMITATION

This Response complies with the 14,000-word limitation found at 40 CFR § 124.19(d)(3).
See 40 CFR § 124.19(d)(1)(iv).

On February 11, 2020, the U.S. Environmental Protection Agency Environmental Appeals Board (EAB) issued an Order in the above-referenced matter, directing the U.S. Environmental Protection Agency, Region 5 (Region) to, “provide, on or before Friday, February 21, 2020, a brief explanation (and any appropriate documentation) of: (1) to whom and by what method(s) the Region sent the Tanaka Letter; (2) all the enclosures that accompanied the Tanaka Letter, including whether the final reissued permit (listed in the Amended Administrative Record index as Document #98) was an enclosure to the Tanaka Letter; and (3) if the final reissued permit was not an enclosure to the Tanaka Letter, how the public could have accessed the final reissued permit.” *See* EAB Order Directing Clarification at 3.

The Region hereby responds to the EAB’s Order.

I. Background

The Region originally issued a permit to Muskegon Development Company on July 3, 2018, for the operation of a Class II Underground Injection Control (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, the EAB issued a narrow remand of the permit with respect to four comment responses, and otherwise denied review.

Pursuant to the Remand Order, the Region addressed the four comments in a revised 2019 Response to Comments (RtC). The Region concluded that “the comments did not raise significant issues to modify EPA’s determination” that the Permit met federal UIC requirements. *See* 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 2019 RtC. The Region also issued a revised Administrative Record (“AR”),¹ in support of the reissued Permit.

On October 25, 2019, Petitioner filed the Petition with the Board challenging the reissued Permit.

II. The Region’s Issuance of the Tanaka Letter

The “Tanaka Letter” was a cover letter dated September 26, 2019, indicating that the Region was transmitting the signed copy of the revised 2019 RtC to all commenters who commented during any of the three opportunities for public comment on the Permit (in writing during the first public comment period (February 10 to March 15, 2017); verbally during the July 27, 2017 public hearing held by EPA in Clare, Michigan; or in writing during the second public comment period (June 21 to August 18, 2017)).

The signed Tanaka Letter and the signed revised 2019 RtC were electronically scanned to Portable Document Format (PDF) and e-mailed on October 5, 2019 by William Tong (Permit Writer, EPA Region 5, Water Division, Permits Branch, UIC Section) to the majority of commenters. For a small number of commenters who provided no e-mail address (or had commented via hard copy letter), paper photocopies of the signed Tanaka Letter and revised 2019 RtC were sent to those commenters via certified U.S. Mail².

¹ 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.

² In support of its Response to Order Directing Clarification #1, EPA attaches copies of the following: i) PDF copy of October 2, 2019 e-mail message to commenters; ii) PDF copy of Response to Comments cover transmittal (“Tanaka letter”) signed September 26, 2019; iii) PDF copy of Revised Response to Comments, signed September 26, 2019; iv) PDF copy of mail list compiled from mailed and e-mailed comments; and v) PDF copy of signed Certificate of Service attesting that the hard copies of the Tanaka

III. All Enclosures That Accompanied the Tanaka Letter

The only enclosure included with the Tanaka Letter that was sent to commenters was the revised 2019 RtC. The final reissued Permit (dated September 26, 2019) was not included with the Tanaka Letter. This was consistent with the practice of the Region 5 UIC program to transmit to all commenters the RtC, but not the final permit. *See* UIC Standard Operating Procedure [‘SOP’] for Public Participation Requirements (May 19, 2014) at 12. This was also consistent with EPA’s regulations at 40 CFR §124.15(a), which requires the Region to “notify” commenters of the “final permit decision,” which refers to a “final decision to issue, deny, modify, revoke and reissue, or terminate a permit.” The Region met these notification requirements by sending each commenter the Tanaka letter and the revised 2019 RtC, which informed the commenters that the Region was reissuing the July 2018 final permit without any changes.

In accordance with the Region’s SOP, the signed copy of the final reissued 2019 Permit was transmitted only to the permit applicant, Muskegon Development Company, by letter signed on September 26, 2019. The Region sent the permit to Muskegon Development Company along with a copy of the 2019 revised RtC and a separate transmittal letter for the final permit signed by Acting Water Division Director Tanaka³.

letter and Revised Response To Comments were hand-delivered to the EPA Region 5 Mail Room on October 2, 2019.

³ In support of its Response to Order Directing Clarification #2, EPA attaches copies of the following: (i) PDF copy of Revised Response to Comments, signed September 26, 2019 (sent to commenters and to Muskegon Development Company); ii) PDF of transmittal letter for final permit, signed September 26, 2019 (sent only to Muskegon Development Company); iii) PDF of Class II underground injection final permit, signed September 26, 2019 (sent only to Muskegon Development Company); and iv) PDF of Underground Injection Control SOP (Standard Operating Procedure) for Public Participation.

IV. Availability of Final Reissued 2019 Permit to the Public

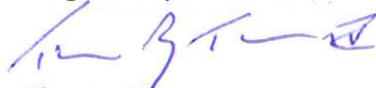
Although the Region did not send the final reissued 2019 Permit to all commenters, as discussed above, it was available to the public on Region 5's website (<https://www.epa.gov/uic/documents-class-ii-permit-mi-035-2r-0034>). While the website specifically lists only the proposed 2017 permit and the final 2018 permit, the reissued 2019 Permit is identical to both of those permits – and the commenters were specifically informed of this fact in the revised 2019 RtC that the Region sent to each of them when the 2019 permit was reissued. *See* revised 2019 RTC at Page 22 (Under the header “Determination,” stating that “No changes have been made to the final permit from the draft permit”). *See also* Tanaka Letter (stating 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.”). Had the Region made any changes to the final reissued 2019 Permit in response to the Region’s review of the issues raised by the EAB’s April 2019 Remand and the Amended Administrative Record, such changes would have been noted in the revised 2019 RtC, as required by 40 CFR § 124.17. But here, where the commenters were informed by the Region through the RtC and Tanaka Letter that there were no such changes, commenters (including Petitioner) were on notice that the final 2018 permit provided on the website constituted the final reissued 2019 Permit. This Permit was available on the website at the time that Petitioner filed its current Petition for Review⁴.

⁴ In support of its Response to Order Directing Clarification #3, EPA attaches copies of the following: i) PDF copy of Revised Response To Comments, dated September 26, 2019; ii) PDF copy of 40 CFR Part 124.15 (U.S. Govt. Printing Office); and iii) the results of February 13 and 18, 2020 internet searches of publicly available EPA Region 5 Public Hearing documents for Class II Permit MI-035-2R-0034. *See*, (<https://www.epa.gov/mi/public-hearing-documents-mi-035-2r-0034>; and <https://www.epa.gov/uic/documents-class-ii-permit-mi-035-2r-0034>). (The 2018 Permit was available

V. Conclusion

The Region placed the unaltered draft and final 2018 Permit, which became the 2019 Permit, on an available Region 5 EPA website. And, the Region believes that this Response should clarify its statements from the November 20, 2019 Reply to Petitioner's Response to Order to Show Cause, and its November 25, 2019 Response to Petition for Review.

Respectfully submitted,



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since at least July 19, 2018 on the Region 5 EPA website.) *See also,*
https://www.epa.gov/sites/production/files/2017-02/documents/mi-035-2r-0034_fact_sheet.pdf

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "EPA Region 5's Response to EAB Order Directing Clarification" 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:

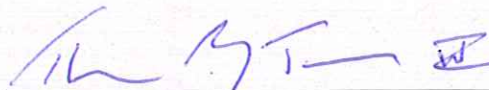
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DATED: February 21, 2020



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