

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

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

**OPPOSED MOTION FOR SUR-REPLY BRIEF TO
EPA REGION 5’S REPLY TO PETITIONER’S RESPONSE TO
ORDER TO SHOW CAUSE WHY PETITION SHOULD NOT BE DISMISSED FOR LACK OF
JURISDICTION**

I, Emerson Joseph Addison III (“Petitioner”), respectfully move for leave to file a Surreply to EPA REGION 5’S Nov. 20 REPLY TO PETITIONER’S RESPONSE TO ORDER TO SHOW CAUSE WHY PETITION SHOULD NOT BE DISMISSED FOR LACK OF JURISDICTION. In support of this motion, Petitioner states that there were a number of inaccuracies and misrepresentations in EPA REGION 5’s REPLY TO PETITIONER’S RESPONSE TO ORDER TO SHOW CAUSE WHY PETITION SHOULD NOT BE DISMISSED FOR LACK OF JURISDICTION regarding its interpretation of Petitioner’s RESPONSE BRIEF: ORDER TO SHOW CAUSE WHY PETITION SHOULD NOT BE DISMISSED FOR LACK OF JURISDICTION Draft Class II Permit in Clare

County, Michigan Issued to Muskegon Development Company (Permit No. MI-035-2R-0034), Holcomb 1-22 Well (“response brief”).

In addition to inaccuracies and misrepresentations, orders to attach additional documents were not clear or concise, and therefore could not be easily followed by individuals with certain cognitive and communication challenges, such as dyslexia and autism. This failure to issue orders in clear and plain language seems to be at odds with Sec. 12132 Discrimination of the Americans with Disabilities Act, which guarantees the equal opportunity to participate in civil and government processes and decisions such as this one (Americans with Disabilities Act, Sec. 12132).

There were also problems with EPA Region 5’s documentation. Specifically, EPA Region 5 failed to submit a number of additional documents to the original EAB filings for the original Muskegon Development challenge (from July 2018). EPA Region 5 did not include the original permit, which contains the specifications and conditions of the permit. The permitting document EPA Region 5 posted to the EAB case site is simply a letter stating the permit is unchanged. This letter contains no information, specifications or conditions of the permit in question (see Filing – Permit Issuer Response Brief, Att 3 “Signed EPA R5 Permit Letter, UIC appeal number 19-02”).

For these reasons, Petitioner respectfully asks the Board to grant leave to file the attached Surreply. EPA Region 5 and Muskegon Development Council oppose this motion. Both parties declined to state their reasons for opposition to Motion for Sur-reply Brief.

Respectfully Submitted,

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PETITIONER SURREPLY TO EPA REGION 5’S REPLY TO

PETITIONER’S RESPONSE TO

**ORDER TO SHOW CAUSE WHY PETITION SHOULD NOT BE DISMISSED FOR LACK OF
JURISDICTION**

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PETITIONER SURREPLY TO
EPA REGION 5'S REPLY TO PETITIONER'S RESPONSE TO
ORDER TO SHOW CAUSE WHY PETITION SHOULD NOT BE DISMISSED FOR LACK OF
JURISDICTION

I. INTRODUCTION AND BACKGROUND

In July 2018, the U.S. Environmental Protection Agency Region 5 issued an Underground Injection Control Permit (“Permit”) to Muskegon Development Company (“Muskegon”). The Permit authorized Muskegon to convert an existing oil production well in Clare County, Michigan, the Holcomb 1-22 well, for injection of fresh water to enhance oil recovery from Muskegon’s other nearby production wells.

Emerson J. Addison III (“Petitioner”), timely appealed the Region’s permit decision to the Environmental Appeals Board (“Board”). The Board remanded the Permit in part and denied review in part. *See generally In re Muskegon Dev. Co.*, 17 E.A.D. 740 (EAB 2019). The Board directed the Region to address two issues on remand.

First, the Board held that the current state of the Region’s Response to Comments document (“RTC”), providing Agency responses to public comments on the draft version of the Permit, substantially impeded a determination as to whether the Region considered and meaningfully responded to certain comments and thereby exercised its considered judgment in issuing the Permit. *Id.* at 746-52.

Second, the Board held that it was unable to determine whether the Region appropriately evaluated the environmental justice implications of the permitting action. *Id.* At 754-56. The Board specified that “[a]nyone 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.” Muskegon Dev., 17 E.A.D. at 762 n.11.

On September 26, 2019, EPA Region 5 issued two documents: The first, REVISED RESPONSE TO COMMENTS ON DRAFT CLASS II PERMIT IN CLARE COUNTY, MICHIGAN, ISSUED TO MUSKEGON DEVELOPMENT COMPANY (PERMIT NO. MI-035-2R-0034), HOLCOMB 1-22 WELL, contained the responses to comments that EPA Region 5 initially failed to respond to.

The EPA decision read as follows:

After consideration of all public comments, EPA has determined that none of the comments submitted have raised issues which would alter EPA's basis for determining that it is appropriate to issue Muskegon Development a permit to operate the Holcomb 1-22 injection well. Therefore, EPA is issuing a final permit to Muskegon Development. No changes have been made to the final permit from the draft permit.

- Revised Response to Comments on Draft Class II Permit in Clare County, Michigan, Issued to Muskegon Development Company (Permit No. MI-035-2R-0034), Holcomb 1-22 Well, page 22

A second document was also issued by EPA Region 5 on September 26, 2019. This second document, RE: FINAL PERMIT FOR MUSKEGON DEVELOPMENT COMPANY'S HOLCOMB 1-22 WELL IN CLARE COUNTY, MICHIGAN; U.S. ENVIRONMENTAL PROTECTION AGENCY PERMIT NUMBER MI-035-2R-0034. This ruling also made it clear that no changes had been made to the permit in any way:

This action constitutes issuance of a UIC Class II permit. Unless this permit decision is appealed to the EAB as described below, the permit will become effective on Nov. 17,

2019. Provided there is no appeal, conversion to an injection well will be authorized to commence on the effective date and in accordance with permit conditions.

- RE: Final Permit for Muskegon Development Company's Holcomb 1-22 Well in Clare County, Michigan; U.S. Environmental Protection Agency Permit Number MI-035-2R-0034, page 1

On October 25, 2019, Petitioner filed a document with the Board captioned "Petition for Review and Petitioner Response to EPA Revised Response to Comments on Draft Class II Permit in Clare County, Michigan, Issued to Muskegon Development Company (Permit No. MI-035-2R-0034), Holcomb 1-22 Well." In the body of his filing, Petitioner alternatively refers to the document as "[t]his Petition for Review / Reply Brief." Pet. at 8. Petitioner's filing references the "Revised RTC on draft," which contains the originally-omitted responses to the comments that were submitted during the public comment period.

On November 4, 2019, the EAB issued "ORDER TO SHOW CAUSE WHY PETITION SHOULD NOT BE DISMISSED FOR LACK OF JURISDICTION, AND REGARDING SERVICE VIA ELECTRONIC MAIL."

In this ruling, the EAB limited the scope of any future appeals to:

The Board specified that "[a]nyone 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." Muskegon Dev., 17 E.A.D. at 762 n.11.

- ORDER TO SHOW CAUSE WHY PETITION SHOULD NOT BE DISMISSED FOR LACK OF JURISDICTION, AND REGARDING SERVICE VIA ELECTRONIC MAIL, page 2.

On November 13, 2019, Petitioner issued RESPONSE BRIEF: ORDER TO SHOW CAUSE WHY PETITION SHOULD NOT BE DISMISSED FOR LACK OF JURISDICTION DRAFT CLASS II PERMIT IN CLARE COUNTY, MICHIGAN ISSUED TO MUSKEGON DEVELOPMENT COMPANY (PERMIT NO. MI-035-2R-0034), HOLCOMB 1-22 WELL (“response brief”). In this response brief, petitioner argued that his

Petition for Review should not be dismissed for lack of jurisdiction because, under 40 C.F.R. §124.19 Appeal of RCRA, UIC, NPDES and PSD Permits, there are grounds for review based on erroneous facts and EAB discretion:

(4) Petition contents. (i) In addition to meeting the requirements in paragraph (d), a petition for review must identify the contested permit condition or other specific challenge to the permit decision and clearly set forth, with legal and factual support, petitioner's contentions for why the permit decision should be reviewed. The petition must demonstrate that each challenge to the permit decision is based on:

(A) A finding of fact or conclusion of law that is clearly erroneous, or

(B) An exercise of discretion or an important policy consideration that the Environmental Appeals Board should, in its discretion, review.

- RESPONSE BRIEF: ORDER TO SHOW CAUSE WHY PETITION SHOULD NOT BE DISMISSED FOR LACK OF JURISDICTION, page 9

Petitioner went on to argue that EAB discretion is justified in this case because

Granting this permit conflicts directly with the EPA’s stated objectives, as defined by its mission statement, to ensure that “Federal laws protecting human health and the environment are administered and enforced fairly, effectively and as Congress intended,” and its duty to ensure that “National efforts to reduce environmental risks are based on

the best available scientific information.” (EPA mission statement

<https://www.epa.gov/aboutepa/our-mission-and-what-we-do>)

- RESPONSE BRIEF: ORDER TO SHOW CAUSE WHY PETITION SHOULD NOT BE DISMISSED FOR LACK OF JURISDICTION, page 9

Petitioner also argued that the responses contained in the REVISED RESPONSE TO COMMENTS ON DRAFT CLASS II PERMIT IN CLARE COUNTY, MICHIGAN, ISSUED TO MUSKEGON DEVELOPMENT COMPANY (PERMIT NO. MI-035-2R-0034), HOLCOMB 1-22 WELL were insufficient to demonstrate that this well will be safe and properly monitored and that the EPA relied on erroneous facts and conclusions to support its decision. Petitioner argued that these errors included a biased use of science, a misinterpretation of statistics provided in a key piece of evidence against the issuance of this permit, and an erroneous exclusion of relevant study results due to a mistaken belief that the statistics on well failures do not apply to wells in Michigan due to differences in geology and use. He went on to provide the study author’s personal contact information (which was willingly given to him by the author of the study for use in his reply) so that the EAB could call his cell phone to ask which interpretation of the study was correct.

On November 20, 2019, EPA Region 5 issued EPA REGION 5’S REPLY TO PETITIONER’S RESPONSE TO ORDER TO SHOW CAUSE WHY PETITION SHOULD NOT BE DISMISSED FOR LACK OF JURISDICTION. The EPA argued that Petitioner’s Response “failed to reference or attach” any new permit decision made by the Region, that Petitioner’s Response does not attach or explain which permit he is challenging, and that Petitioner raises arguments related to the merit of his Petition for Review, rather than the narrow jurisdictional response required by the Board’s Order. Accordingly, the EPA argued that the Petitioner’s Response should be dismissed, and that all portions of Petitioner’s Response not related to jurisdictional response should be stricken.

II. ARGUMENT

Petitioner's RESPONSE BRIEF: ORDER TO SHOW CAUSE WHY PETITION SHOULD NOT BE DISMISSED FOR LACK OF JURISDICTION should not be dismissed because instructions to reference or attach specific documents were not clear, because the "new" permit decision is not actually a new permit, but rather a document stating the permit will be reissued and the draft permit is unchanged (this document contains no information about the actual permit), and because the issues EPA Region 5 claims were outside the scope of these proceedings were not actually outside the scope, as they were responses to EPA REGION 5 REVISED RESPONSE TO COMMENTS ON DRAFT CLASS II PERMIT IN CLARE COUNTY, MICHIGAN, ISSUED TO MUSKEGON DEVELOPMENT COMPANY (PERMIT NO. MI-035-2R-0034), HOLCOMB 1-22 WELL. Additionally, because EPA Region 5 Responses to Comments were recently issued, any references to these responses are fair game, as they have not been addressed yet by these proceedings, either in the earlier Muskegon Permit Appeal which resulted in a partial remand, or in the new challenge.

As previously stated, inferred instructions to reference or attach new permit decision were not "clear." Moreover, a new permit was not issued, but rather a document stating

This action constitutes issuance of a UIC Class II permit. Unless this permit decision is appealed to the EAB as described below, the permit will become effective on Nov. 17, 2019. Provided there is no appeal, conversion to an injection well will be authorized to commence on the effective date and in accordance with permit conditions.

- RE: Final Permit for Muskegon Development Company's Holcomb 1-22 Well in Clare County, Michigan; U.S. Environmental Protection Agency Permit Number MI-035-2R-0034, page 1

Additionally, the conditions of the Permit have not been altered from the Draft Permit. Indeed, in order to know the substance, contents, and conditions of the "Reissued Permit," one must read the

Draft Permit, as none of this information can be found in any of the documents EPA Region 5 has issued during the course of these proceedings. Moreover, the first permit was partially remanded. Essentially, all EPA Region 5 did was to give a few responses to the comments that it had initially neglected to respond to, and then reissue the permit using another document which contains no permit information at all (again, to actually know the contents of the permit, one must go back to the July 2018 Permit). Moreover, the EPA failed to upload its “new” permit decision to the original EAB case site (a new EAB case site has been created for this case, one which omits nearly all proceedings in this matter). Indeed, as of November 30, 2019, the draft permit from July 2018 has still not been uploaded by the EPA to the EAB case site for the new Muskegon challenge. Additionally, the following documents are inaccessible from the case site (as of Nov. 30, 2019): EPA Region 5’s Filing - Permit Issuer Response Brief failed to attach the case record. Attachment 4 – Attachment 3.1 – Administrative Record – EPA R5_UIC App No. 19-02; Attachment 5 – Attachment 3.2 – Administrative Record – EPA R5_UIC App No. 19-02; and Attachment 6 – Attachment 3.3 – Administrative Record – EPA R5_UIC App No. 19-02.

EPA Region 5 attempts to obfuscate Petitioner’s filings and EAB proceedings. EPA Region 5 erroneously argues that clear orders were given to “reference or attach” any new permit decision made by the Region. This is misleading, Petitioner contends that no such “clear orders” were given. Moreover, any orders which were given were not stated clearly enough to include individuals with cognitive and communication disabilities, such as autism spectrum disorder or dyslexia. If the EAB had intended to issue clear orders to this end, then said orders would not be readily apparent to many people with cognition disabilities such as Autism Spectrum Disorder or dyslexia, and thus these “clear orders” would be in violation of Sec. 12132. Discrimination of the Americans with Disabilities Act, which guarantees all Americans the opportunity to participate in government and decisions such as this one (Americans with Disabilities Act, Sec. 12132) and dictates that government entities must make

reasonable accommodations for individuals with disabilities and that they must be provided with an equally effective opportunity to participate in or benefit from a public entity's aids, benefits, and services. No such accommodations were made. Stating orders more clearly would constitute reasonable accommodation, and that failure to state requests in a manner which is easily accessible to people with cognitive differences, such as autism or dyslexia, is tantamount to discrimination and a violation of the Americans with Disabilities Act. As a relief from this possible violation of the ADA, Petitioner requests the Board simply admit all the documents in question. It is within the discretion of the Board to apply this equal access solution.

In addition to likely problems regarding access to and participation in government proceedings under the Americans with Disabilities Act, there is also the question of why the new permit decision was not posted to the EAB by EPA Region 5 after EPA Region 5 reissued the permit, given that this case had already been submitted before the EAB and that the "reissuance" of the permit was in response to official proceedings.

Additionally, a "new" permit was never actually issued. Rather, another document was issued by EPA Region 5, RE: FINAL PERMIT FOR MUSKEGON DEVELOPMENT COMPANY'S HOLCOMB 1-22 WELL IN CLARE COUNTY, MICHIGAN; U.S. ENVIRONMENTAL PROTECTION AGENCY PERMIT NUMBER MI-035-2R-0034, which EPA Region 5 claims constitutes issuance of the permit, despite the fact that this new document did not include any of the permit conditions, technical specifications or even a simple summary of the permit. The document simply read:

This action constitutes issuance of a UIC Class II permit. Unless this permit decision is appealed to the EAB as described below, the permit will become effective on Nov. 17, 2019. Provided there is no appeal, conversion to an injection well will be authorized to commence on the effective date and in accordance with permit conditions.

- RE: Final Permit for Muskegon Development Company's Holcomb 1-22 Well in Clare County, Michigan; U.S. Environmental Protection Agency Permit Number MI-035-2R-0034, page 1

Thus, in order to know the substance, contents, and conditions of the "Reissued Permit," one must read the draft permit, as the draft permit from July 2018 is the only place where any of this information can be found, despite the fact that the July 2018 Permit Decision was partially remanded.

EPA Region 5 also argues that Petitioner failed to explain that he was challenging EPA Region 5's September 26, 2019 Permit ("Reissued Permit"). Again, this "reissued" document failed to include any conditions of the permit, thus in order to challenge said document, the original permit must also be included. Moreover, the July 2018 permit had already been remanded, thus this new "Reissued Permit" is obviously the permit in question (even though it contains no information about the actual injection well).

Specifically, EPA Region 5'S Nov. 20 REPLY TO PETITIONER'S RESPONSE TO ORDER TO SHOW CAUSE WHY PETITION SHOULD NOT BE DISMISSED FOR LACK OF JURISDICTION erroneously claims that "In his Response to this Order, Petitioner raises a number of arguments relating to the substantive merits of his Petition for Review, rather than to the narrow jurisdictional response required by the Board's Order." EPA Region 5 then asks the Board to strike all such portions of the Petitioner's November 13, 2019 Response not specifically related to the narrow jurisdictional response required by the Board's Order.

Again, EPA Region 5 has made a number of flawed arguments. The arguments included in Petitioner's Response Brief were raised in summation of earlier rulings in this case and were necessarily included as examples of the inadequacies of EPA REGION 5'S SEPTEMBER 26, 2019 REVISED RESPONSE TO COMMENTS ON DRAFT CLASS II PERMIT IN CLARE COUNTY, MICHIGAN, ISSUED TO MUSKEGON DEVELOPMENT COMPANY (PERMIT NO. MI-035-2R-

0034), HOLCOMB 1-22 WELL and RE: FINAL PERMIT FOR MUSKEGON DEVELOPMENT COMPANY'S HOLCOMB 1-22 WELL IN CLARE COUNTY, MICHIGAN; U.S.

ENVIRONMENTAL PROTECTION AGENCY PERMIT NUMBER MI-035-2R-0034. Moreover, these examples also serve as clarification for the EAB.

III. CONCLUSION

Petitioner's RESPONSE BRIEF: ORDER TO SHOW CAUSE WHY PETITION SHOULD NOT BE DISMISSED FOR LACK OF JURISDICTION should not be dismissed because instructions to reference or attach specific documents were not clear (and due to confusing wording and failure to clearly give direction, likely constitutes a violation of the ADA), because the "new" permit decision is not actually a new permit, but rather a document stating the permit will be reissued and the draft permit is unchanged (the documents constituting the reissuance of the permit contain no information about the actual permit, technical specifications, conditions, etc.), and because the issues EPA Region 5 claims were outside the scope of these proceedings were not actually outside the scope, as they were responses to EPA REGION 5 REVISED RESPONSE TO COMMENTS ON DRAFT CLASS II PERMIT IN CLARE COUNTY, MICHIGAN, ISSUED TO MUSKEGON DEVELOPMENT COMPANY (PERMIT NO. MI-035-2R-0034), HOLCOMB 1-22 WELL. Additionally, because EPA Region 5 only recently issued its responses to the comments that were originally omitted, any references to these responses are fair game, as these comments have not yet been addressed by these proceedings, either in the earlier Muskegon Permit Appeal which resulted in a partial remand, or in the new challenge.

For these reasons, the Board should not dismiss or strike any portions of PETITIONER'S RESPONSE TO ORDER TO SHOW CAUSE WHY PETITION SHOULD NOT BE DISMISSED FOR LACK OF JURISDICTION. Petitioner also requests this action as relief to provide fair access

under the Americans with Disabilities Act. Sec. 12132. 42 U.S. Code § 12132. Discrimination.

Petitioner believes these actions are within the discretion of the Board.

Sincerely,

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IV. ATTACHMENTS

MDC_UICAppNo19_02_EPAR5ReplytoPetitionerResponsetoEABOrder_11.20.2019.pdf

mi-035-2r-0034_draft_permit.pdf

Muskegon Order to Show Cause Why Petition Should Not Be Dismissed.pdf

Response Brief for Oder to Show Cause MI-035-2R-0034.pdf

Revised Petition for Review and Response to Revised response to comment MI-035-2R-0034.pdf

Signed Revised RTC on Draft Class II Permit in Clare County MI Issued to Muskegon Develop. Co.

#MI-035-2R-0034.pdf

V. 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).

VI. TABLE OF AUTHORITIES

Americans with Disabilities Act. Sec. 12132. 42 U.S. Code § 12132. Discrimination 10 - 14

"Petition for Review and Petitioner Response to EPA Revised Response to Comments on Draft Class II Permit in Clare County, Michigan Issued to Muskegon Development Company (Permit No. MI-035-2R-0034), Holcomb 1-22 Well" 6 – 8, 12

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VII. Certificate of Service

CERTIFICATE OF SERVICE

2 December, 2019

I, Emerson Joseph Addison, hereby certify that copies of the Motion for Surreply and Surreply Brief regarding the Muskegon Development Company UIC Permit No. MI-035-2R-0034, Holcomb 1-22 Well, were served by Electronic Mail (email) the following persons, on the day of 2 December, 2019:

By electronic filing to:

- * Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
1200 Pennsylvania Avenue, NW
Mail Code 1103M
Washington, DC 20460-0001

By electronic mail to:

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DATED: December 2, 2019

Sincerely,

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