

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

In the Matter Of:) Docket No. SDWA-05-2022-0003
)
Muskegon Development Company) Proceeding under Section 1423(c) of the
Mount Pleasant, Michigan,) Safe Drinking Water Act,
) 42 U.S.C. § 300h-2(c)
Respondent.)
_____)

Consent Agreement and Final Order

Preliminary Statement

1. This is an administrative action commenced and concluded under Section 1423(c)(2) of the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300h-2(c)(2), and Sections 22.1(a)(9), 22.13(b), 22.18(b)(2) and (3), and 22.45 of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits* (Consolidated Rules), as codified at 40 C.F.R. Part 22.
2. Complainant is the Director of the Enforcement and Compliance Assurance Division, U.S. Environmental Protection Agency (EPA), Region 5.
3. Respondent is Muskegon Development Company, a corporation doing business in Michigan.
4. Where the parties agree to settle one or more causes of action before the filing of a complaint, an administrative action may be commenced and concluded simultaneously by the issuance of a consent agreement and final order (CAFO). 40 C.F.R. § 22.13(b).
5. The parties agree that settling this action without the filing of a complaint or the adjudication of any issue of fact or law is in their interest and in the public interest.
6. Respondent consents to the assessment of the civil penalty specified in this CAFO and to the terms of this CAFO.

Jurisdiction and Waiver of Right to Hearing

7. Respondent admits the jurisdictional allegations in this CAFO and neither admits nor denies the factual allegations in this CAFO.

8. Respondent waives its rights to notice of EPA's proposal to issue this CAFO, to request a hearing as provided at 40 C.F.R. § 22.15(c) and Section 1423(c)(3) of the SDWA, 42 U.S.C. § 300h-2(c)(3), any right to contest the allegations in this CAFO, and its right to appeal this CAFO.

Statutory and Regulatory Background

9. Section 1421 of SDWA, 42 U.S.C. § 300h, requires that the Administrator of EPA promulgate regulations, which shall include permitting requirements as well as inspection, monitoring, recordkeeping, and reporting requirements, for state underground injection control (UIC) programs to prevent any underground injection which endangers drinking water sources.

10. Section 1421(d)(1) of the SDWA, 42 U.S.C. § 300h(d)(1), defines "underground injection" as the subsurface emplacement of fluids by well injection and excludes the underground injection of natural gas for purposes of storage and the underground injection of fluids or propping agents (other than diesel fuels) pursuant to hydraulic fracturing operations related to oil, gas, or geothermal production activities.

11. Section 1421(d)(2) of the SDWA, 42 U.S.C. § 300h(d)(2), provides that underground injection endangers drinking water sources if such injection may result in the presence in underground water which supplies or can reasonably be expected to supply any public water system of any contaminant, and if the presence of such contaminant may result in such system not complying with any national primary drinking water regulation or may otherwise adversely affect the health of persons.

12. Pursuant to Section 1422(b) of the SDWA, 42 U.S.C. § 300h-1(b), designated states shall apply to obtain primary enforcement responsibility of their UIC programs (a concept called “primacy”).

13. Section 1422(c) of the SDWA, 42 U.S.C. § 300h-1(c), provides that the Administrator for EPA shall by regulation prescribe UIC programs applicable to those states that have not obtained primacy for their UIC programs or do not have primacy for all types of wells.

14. Pursuant to Sections 1421 and 1422 of the SDWA, 42 U.S.C. §§ 300h and 300h-1, respectively, EPA has promulgated UIC regulations at 40 C.F.R. Parts 124 and 144 through 148.

15. The SDWA and its regulations prohibit all underground injections unless authorized by a permit or a rule. 42 U.S.C. § 300h(b)(1)(A); 40 C.F.R. § 144.11.

16. EPA has primary enforcement responsibility of the UIC program in the State of Michigan. The UIC program for the State of Michigan is set forth at 40 C.F.R. Part 147, Subpart X, effective June 25, 1984, and consists of the UIC program requirements of 40 C.F.R. Parts 124, 144, 146, 148, and any additional requirements set forth in Subpart X.

17. Pursuant to 40 C.F.R. § 144.1(g), the UIC program regulates underground injection by six classes of wells, and all owners or operators of these injection wells must be authorized either by permit or rule. Class II wells inject fluids 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; for enhanced recovery of oil or natural gas; and for storage of hydrocarbons which are liquid at standard temperature and pressure. 40 C.F.R. § 144.6(b)(1).

18. In accordance with 40 C.F.R. § 144.51(a), any UIC permittee must comply with all conditions of its permit which include the requirements set forth in 40 C.F.R. §§ 144.11–144.19. Any permit noncompliance constitutes a violation of the SDWA, except that the permittee need not comply with the provisions of its permit to the extent and for the duration such noncompliance is authorized in an emergency permit under 40 C.F.R. § 144.34.

19. Section 1423(a)(2) of the SDWA, 42 U.S.C. § 300h-2(a)(2), authorizes EPA to assess a civil penalty to any person found to be in violation of any requirement of an applicable UIC program in a state that does not have primacy and/or order compliance with such requirement or regulation pursuant to Section 1423(c)(2) of the SDWA, 42 U.S.C. § 300h-2(c)(2).

20. Under Section 1423(c)(2) of the SDWA, 42 U.S.C. § 300h-2(c)(2), and 40 C.F.R. Part 19, EPA may assess a civil penalty of not more than \$11,803 for each day of violation, up to a maximum administrative penalty of \$295,088 for SDWA violations occurring after November 2, 2015, where penalties are assessed on or after December 23, 2020 and/or issue an order requiring compliance.

Factual Allegations and Alleged Violations

21. Respondent is a corporation, and as such, Respondent is a “person” as that term is defined at Section 1401(12) of the SDWA, 42 U.S.C. § 300f(12), and 40 C.F.R. § 144.3.

22. At all times relevant to this CAFO, Respondent was authorized to construct and operate the Rechstiener 2, Friebe 3, State Ostego Lake 6 SWD, and Ruth Cox 3 wells identified below in accordance with the EPA-issued Permits (the Permits):

- a. EPA Permit No. MI-017-2D-0005, Rechstiener 2, located in Bay County;
- b. EPA Permit No. MI-017-2D-0004, Friebe 3, located in Bay County;

- c. EPA Permit No. MI-137-2D-0009, State Otsego Lake 6 SWD, located in Otsego County; and
- d. EPA Permit No. MI-129-2D-0003, Ruth Cox 3, located in Ogemaw County.

23. The Permits authorize the underground injection of salt water into the Rechsteiner 2, Friebe 3, State Otsego Lake 6 SWD, and Ruth Cox 3 wells, subject to the terms and conditions set forth in the Permits and regulations.

24. Salt water is a “fluid” because it is a material or substance that flows or moves whether in a semisolid, liquid, sludge, gas, or any other form or state. 40 C.F.R. § 144.3.

25. The subsurface emplacement of salt water through each of the wells identified in the Permits is a “well injection.” 40 C.F.R. § 144.3.

26. Each of the wells identified in the Permits is a facility or activity as defined by 40 C.F.R. § 144.3 because it is a UIC “injection well,” or another facility or activity that is subject to regulation under the UIC program.

27. At all times relevant to this CAFO, Respondent owned and operated injection wells in the State of Michigan and was thus subject to the UIC program requirements set forth at 40 C.F.R. Parts 124, 144, 146, 147 Subpart X, and 148.

28. At all times relevant to this CAFO, Respondent did not apply for and obtain an emergency permit pursuant to 40 C.F.R. § 144.34.

29. On May 20, 2021, EPA issued a Notice of Potential Violation and Opportunity to Confer to Respondent alleging certain potential violations of the Permits and the SDWA.

30. On June 1, 2021, Respondent requested a meeting to discuss the Notice of Potential Violation and Opportunity to Confer.

31. On June 10, 2021, Respondent submitted to EPA a written response to the Notice of Potential Violation and Opportunity to Confer.

32. On June 15, 2021, Respondent and EPA held a phone conference to discuss the Notice of Potential Violation and Opportunity to Confer

33. Under 40 C.F.R. § 144.51(a) and Section (E)(1) of the Permits, Respondent is required to comply with all conditions of the relevant permit and regulations, and any noncompliance constitutes a violation of the SDWA.

Count 1 - Failure to Maintain Positive Pressure

34. Section (G)(1)(a)(iv) of the Rechstiener 2, Friebe 3, and State Otsego Lake 6 SWD permits and Section (G)(1)(b)(iv) of the Ruth Cox 3 permit state that a positive pressure shall be maintained on the annulus.

35. Respondent consistently reported “0 psi” for the annulus pressure on its monthly reports to EPA for the periods identified below:

- a. July 2016 to April 2018, August 2018 to December 2019, September 2020, October 2020, December 2020, March 2021, and April 2021 at the Rechstiener 2 well;
- b. July 2016 to April 2018, June 2018 to June 2019, August 2019 and November 2019 at the Friebe 3 well;
- c. July 2016 to September 2019 at the Ruth Cox 3 well; and
- d. July 2016 to April 2021 at the State Otsego Lake 6 SWD well.

36. Each day Respondent failed to maintain positive pressure on the annulus constitutes a violation of Section (G)(1)(a)(iv) of the permits for the Rechstiener 2, Friebe 3, and State Otsego Lake 6 SWD wells and Section (G)(1)(b)(iv) of the permit for the Ruth Cox 3 well,

UIC regulations at 40 C.F.R. §§ 144.51(a) and 146.13(a)(3), and the SDWA.

Count 2 - Failure to Report Specific Gravity Measurements

37. Section (G)(3)(a) of the Rechstiener 2, Friebe 3, and Ruth Cox 3 permits requires monthly reports to be submitted to EPA. These reports shall include the weekly measurements of injection pressure, annulus pressure, flow rate and cumulative volume, and monthly measurements of the specific gravity of the injected fluids.

38. Monthly reports that Respondent submitted to EPA from July 2016 to April 2021 for the wells identified in Paragraph 37 did not report specific gravity measurements.

39. Each day Respondent failed to report specific gravity measurements constitutes a violation of Section (G)(3)(a) of the permits for the Rechstiener 2, Friebe 3, and Ruth Cox 3 wells, the UIC regulations at 40 C.F.R. § 144.51(a) and (j), and the SDWA.

Count 3 - Failure to Report Quarterly Chemical Composition Analysis

40. Section (G)(3)(b) and Attachment E of the permits for the Rechstiener 2, Friebe 3, and Ruth Cox 3 wells require Muskegon Development Company to submit quarterly reports to EPA. Quarterly reports must include a chemical composition analysis of the injectate for the following chemicals: sodium, calcium, magnesium, barium, total iron, chloride, sulfate, carbonate, bicarbonate, and sulfide. Quarterly reports must also include the total dissolved solids, pH, and resistivity of the injectate.

41. Respondent did not include the chemical composition analysis in any quarterly report submissions for the wells identified in Paragraph 40 from July 2016 to April 2021.

42. Respondent failed to submit quarterly reports for the wells identified in Paragraph 40 for Quarters 1 and 4 in 2020. Respondent also failed to submit a quarterly report for the Friebe 3 well for Quarter 4 of 2016.

43. Each day Respondent failed to report quarterly chemical composition analysis of the injectate constitutes a violation of Section (G)(3)(b) of the permits, the UIC regulations at 40 C.F.R. § 144.51(a) and (j), and the SDWA.

Civil Penalty

44. Based upon the facts alleged in this CAFO, the factors listed in Section 1423(c)(4)(B) of the SDWA, 42 U.S.C. 300h-2(c)(4)(B), and EPA's UIC Program Judicial and Administrative Order Settlement Penalty Policy (September 1993) (EPA's UIC Penalty Policy), EPA has determined that an appropriate civil penalty to settle this action is \$ 75,905.

45. Within 30 days after the effective date of this CAFO, Respondent must pay a \$75,905 civil penalty by electronic funds transfer, payable to "Treasurer, United States of America," and sent to:

Federal Reserve Bank of New York
ABA No. 021030004
Account No. 68010727
33 Liberty Street
New York, New York 10045

In the comment or description field of the electronic funds transfer, state Respondent's name and the docket number of this CAFO.

46. When Respondent pays the penalty or any portion thereof, Respondent must send a notice of payment that states Respondent's name and the docket number of this CAFO to EPA electronically, to the extent possible. Electronic submissions must be sent to the following addresses: girouard.taylor@epa.gov, R5WECA@epa.gov and frasco.lisa@epa.gov. If electronic submittal is not possible, the submissions must be made by certified mail (return receipt requested) and mailed to the following addresses:

Taylor Girouard (ECW-15J)
Water Enforcement and Compliance Assurance Branch

Enforcement and Compliance Assurance Division
U.S. Environmental Protection Agency, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

Lisa Frasco (C-14J)
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 5
77 W. Jackson Boulevard
Chicago, Illinois 60604

Regional Hearing Clerk (E-19J)
U.S. Environmental Protection Agency, Region 5
77 W. Jackson Boulevard
Chicago, Illinois 60604

47. This civil penalty is not deductible for federal tax purposes.
48. Pursuant to 31 U.S.C. § 3717 and 40 C.F.R. § 13.11, Respondent must pay the following on any amount overdue under this CAFO: interest accrued on any overdue amount from the date payment was due at a rate established by the Secretary of the Treasury pursuant to 26 U.S.C. § 6621(a)(2); the United States' enforcement expenses, including but not limited to attorneys' fees and costs incurred by the United States for collection proceedings; a handling charge fee each month that any portion of the penalty is more than 30 days past due; and up to 6% per year penalty on any principal amount 90 days past due.
49. If Respondent does not pay timely the civil penalty, EPA may request the United States Department of Justice bring an action to collect any unpaid portion of the penalty with interest, handling charges, nonpayment penalties, and the United States' enforcement expenses for the collection action under Section 1423(c)(7) of the SDWA, 42 U.S.C. § 300h-2(c)(7). The validity, amount, and appropriateness of the civil penalty are not reviewable in a collection action.

50. This CAFO resolves only Respondent's liability for federal civil penalties for the violations alleged in this CAFO.

51. This CAFO constitutes a "previous violation" as that term is used in EPA's UIC Penalty Policy and to determine Respondent's "history of such violations" under Section 1423(c)(4)(B) of the SDWA, 42 U.S.C. § 300h-2(c)(4)(B).

52. Each party agrees to bear its own costs and attorneys' fees in this action.

53. Except as provided in Paragraph 50, above, compliance with this CAFO will not be a defense to any actions subsequently commenced pursuant to federal law administered by EPA.

Compliance Requirements

54. As provided by Section 1423(c)(2) of the SDWA, 42 U.S.C. § 300h-2(c)(2), Respondent shall:

- (i) Within 14 days of the effective date of this Order, maintain positive pressure on the annulus at the wells identified in the Permits;
- (ii) For 12 months from the effective date of this Order, submit to EPA copies of all records of monitoring information with its monthly reports at the Rechstiener 2, Friebe 3, and Ruth Cox 3 wells. If sent by certified mail, reports and records of all monitoring information shall be postmarked no later than the 10th day of the month following the reporting period;
- (iii) Within 90 days of the effective date of this Order, submit to EPA for review and approval, and upon approval, implement, a standard operating procedure (SOP) for use in providing adequate direction to all staff or contractors in monitoring, recording, and reporting practices required by the Permits. The SOP must address procedures for measuring injection pressure, annulus pressure, flow rate and cumulative volume with calibrated gauges and flow meters or totalizers. The SOP must also address how all monitoring information will be maintained in accordance with the Permits and 40 C.F.R. § 144.51(j), including all calibration and maintenance records and copies of all records from the date of the sample, measurement, or report.

55. To the extent possible, Respondent must electronically submit all reports, notifications, documentation, submissions, and other correspondence required to be submitted by Paragraph 54 to EPA. If electronic submittal is not possible, the submissions must be made by certified mail (return receipt requested) to the enforcement officer whose name and address is identified in Paragraph 46, above.

56. Respondent must provide all electronic documents submitted pursuant to Paragraph 54 in unsecured, accessible, searchable, format as a Portable Document Format (PDF) or electronic spreadsheet. Respondent must create a document index that clearly identifies any single electronic document that has been separated into multiple electronic files (because of size limitation or otherwise) and each component file that comprises the full document.

57. Reports, notifications, documentation, and submissions must be signed by a duly authorized representative of Respondent and shall include the following statement consistent with 40 C.F.R. § 144.32(d):

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

58. Respondent may not withhold information based on a claim that it is confidential. However, pursuant to 40 C.F.R. Part 2, Subpart B, Respondent may assert a claim of business confidentiality regarding any portion of the information submitted in response to Paragraph 54, as provided in 40 C.F.R. § 2.203 by placing on (or attaching to) the information, at the time it is submitted to EPA, a cover sheet, stamped or typed legend, or other suitable form of notice employing language such as trade secret, proprietary, or company confidential. Allegedly

confidential portions of otherwise non-confidential documents should be clearly identified by the business, and may be submitted separately to facilitate identification and handling by EPA. If the business desires confidential treatment only until a certain date or until the occurrence of a certain event, the notice should so state. The failure to furnish a confidentiality claim with your response may result in the information being made available to the public without further notice to you. EPA's confidential business information (CBI) regulations are at 40 C.F.R. Part 2, Subpart B.

59. Respondent should segregate any personnel, medical, and similar files from their responses and include that information on a separate sheet(s) marked as "Personal Privacy Information." Disclosure of such information to the general public may constitute an invasion of privacy.

60. If Respondent finds at any time after submitting information that any portion of that information is false or incorrect, the signatory must notify EPA immediately. Knowingly submitting false information to EPA in response to this Order may subject Respondent to criminal prosecution under Section 1423(b) of the SDWA, 42 U.S.C. § 300h-2(b), as well as 18 U.S.C. §§ 1001 and 1341.

61. Submissions required by Paragraph 54 shall be deemed submitted on the date they are sent electronically or on the date postmarked if sent by U.S. mail.

62. The information required to be submitted pursuant to Paragraph 54 is not subject to the approval requirements of the Paperwork Reduction Act of 1995, 44 U.S.C. § 3501 et seq because it seeks the collection of information by an agency from specific individuals or entities as part of an administrative action.

63. For purposes of the identification requirement in Section 162(f)(2)(A)(ii) of the Internal Revenue Code, 26 U.S.C. § 162(f)(2)(A)(ii), and 26 C.F.R. § 1.162-21(b)(2), performance of Paragraph 54 is restitution, remediation, or required to come into compliance with the law.

64. EPA may use any information submitted in accordance with Paragraph 54 in support of an administrative, civil, or criminal action against Respondent.

65. EPA may terminate this Order at any time by written notice to Respondent.

66. Absent the notice described in Paragraph 65, Respondent may request in writing that EPA terminate this CAFO. With this request for termination, Respondent must submit to the EPA enforcement officer a written final report and certification of completion describing all actions taken to comply with all requirements of the compliance program in Paragraph 54. Respondent must include the certification language required under Paragraph 57. In response to the request for termination and written final report, EPA may require additional information, actions, or evidence from Respondent to show completion of the compliance requirements; EPA may pursue appropriate administrative or judicial action to require compliance with this Order; or EPA may accept the request for termination. This Order shall terminate on the date that EPA notifies Respondent in writing that EPA agrees with Respondent's request for termination.

General Provisions

67. The parties consent to service of this CAFO by e-mail at the following valid e-mail addresses: frasco.lisa@epa.gov (for Complainant), and whorn@mikameyers.com, (for Respondent).

68. Violation of this CAFO shall be deemed a violation of the SDWA for purposes of Section 1423(b) of the SDWA, 42 U.S.C. § 300h-2(b).

69. This CAFO does not affect the rights of EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violation of law.

70. This CAFO does not affect Respondent's responsibility to comply with the SDWA and other applicable federal, state, or local laws and permits.

71. The terms of this CAFO bind Respondent and its successors and assigns.

72. Each person signing this CAFO certifies that he or she has the authority to sign for the party whom he or she represents and to bind that party to the terms of this CAFO.

73. This CAFO constitutes the entire agreement between the parties.

74. The parties acknowledge and agree that final approval by EPA of this CAFO is subject to Section 1423(c)(3) of the SDWA, 42 U.S.C. § 300h-2(c) which provides, among other procedural requirements, public notice and a reasonable opportunity to comment on any proposed penalty order.

75. The parties acknowledge and agree that final approval by EPA of this CAFO is subject to 40 C.F.R. § 22.45(c)(4) which sets forth requirements under which a person not a party to this proceeding may petition to set aside a consent agreement and final order on the basis that material evidence was not considered.

76. Unless an appeal for judicial review is filed in accordance with Section 1423(c)(6) of the SDWA, 42 U.S.C. § 300h-2(c)(6) or 40 C.F.R. § 22.45, this CAFO shall become effective 30 days after the date of issuance, which is the date that the Final Order contained in this CAFO is signed by the Regional Judicial Officer or Regional Administrator.

Consent Agreement and Final Order
In the Matter of: Muskegon Development Company
Docket Number. SDWA-05-2022-0003

Muskegon Development Company, Respondent

 11/10/22
William C. Myler, Jr. Date

United States Environmental Protection Agency, Complainant

MICHAEL HARRIS

Digitally signed by MICHAEL
HARRIS
Date: 2022.01.20 11:57:56 -06'00'

Michael D. Harris *(signature and date)*
Director
Enforcement and Compliance Assurance Division
U.S. Environmental Protection Agency, Region 5

Consent Agreement and Final Order
In the Matter of: Muskegon Development Company
Docket No. SDWA-05-2022-0003

Final Order

This Consent Agreement and Final Order, as agreed to by the parties, shall become effective 30 days after issuance, unless an appeal for judicial review is filed in accordance with Section 1423(c)(6) of the SDWA, 42 U.S.C. § 300h-2(c)(6), or 40 C.F.R. § 22.45(c)(4)(iii). This Final Order concludes this proceeding pursuant to 40 C.F.R. §§ 22.18, 22.31, and 22.45. IT IS SO ORDERED.

Ann Coyle *(signature and date)*
Regional Judicial Officer
U.S. Environmental Protection Agency
Region 5

Consent Agreement and Final Order
In the Matter of: Muskegon Development Company
Docket Number. SDWA-05-2022-0003

Certificate of Service

I certify that I served a true and correct copy of the foregoing **Consent Agreement and Final Order**, docket number SDWA-05-2022-0003, which was filed on January 24, 2022, in the following manner to the following addresses:

M

Copy by e-mail to Respondent: David Bell
davidbell@muskegondevelopment.com

Copy by e-mail to Attorney for Complainant: Lisa Frasco
frasco.lisa@epa.gov

Copy by e-mail to Attorney for Respondent: William Horn
whorn@mikameyers.com

Copy by e-mail to Regional Judicial Officer: Ann Coyle
coyle.ann@epa.gov

(signature and date)

Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 5