

Zapata, Cesar

From: Conley, Alanna
Sent: Wednesday, December 4, 2019 3:16 PM
To: Conley, Alanna
Subject: FW: Response to Wells Fargo re: Hendry Energy UIC Financial Responsibility

From: Armor, Suzanne <Armor.Suzanne@epa.gov<mailto:Armor.Suzanne@epa.gov>>
Sent: Wednesday, September 25, 2019 1:34 PM
To: Sherman, Matthew <Matthew.Sherman@wellsfargo.com<mailto:Matthew.Sherman@wellsfargo.com>>
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Subject: Response to Wells Fargo re: Hendry Energy UIC Financial Responsibility

Dear Mr. Sherman:

It was a pleasure speaking to you and Mr. Kraynak yesterday regarding the process for amending the existing Trust Agreement between Hendry Energy Services LLC ("Hendry") and Wells Fargo Bank ("Wells Fargo") for financial responsibility of Hendry's proposed additional well, Red Cattle SWDW#27-3. We reiterate our appreciation for Wells Fargo's diligence in researching this issue, and offer the EPA's position on the necessity for the EPA to execute any amendment to the Trust Agreement.

By way of introduction, it is helpful to put the financial responsibility component into context in the permitting process. As we discussed, this Underground Injection Control (UIC) permit for this proposed well is currently pending before EPA, and cannot be permitted until an adequate financial responsibility instrument is in place. See 40 C.F.R. §§ 144.28(d)(1) and 144.52(a)(7). Under the UIC regulations and the Safe Drinking Water Act, Hendry must have a valid permit in order to conduct injection activities; if it performs unauthorized injection activities, it could be subject to enforcement, including possible civil penalties. In order to demonstrate financial responsibility, a permittee should "submit an estimate of the cost to plug and abandon the wells and receive the EPA's approval for [that amount]. To determine the appropriate level of financial responsibility for the plugging and abandonment plan, an owner or operator should obtain a cost estimate from an independent third-party firm in the business of plugging wells." See Federal Financial Responsibility Demonstrations for Owners or Operators of Class II Oil- and Gas-Related Injection Wells (Nov. 2016) (attached), emphasis added. It is only after the EPA's approval of this cost estimate that the permittee will secure the appropriate financial responsibility instrument, so, in essence, the EPA will have already approved the amount of FR and location of the wells to be included in any modification to Schedules A and/or B before they get to the financial institution for amendment of the Trust Agreement.

Subsequent modifications of Schedules A and B are similarly contemplated by the model Trust Agreement language and the regulations associated with them. The regulation which established the model trust agreement language indicates that "Schedule A of the trust agreement must be updated within 60 days after a change in the amount of the current plugging and abandonment cost estimate covered by the agreement." 40 C.F.R. 144.63(a)(2). Section 3 of the Trust Agreement addresses modifications to Schedule B, and states, in relevant part, "The [Trust] Fund is established initially as consisting of the property, which is acceptable to the Trustee, described in Schedule B attached hereto. Such property and any other property subsequently transferred to the Trustee is referred to as the Fund" This language indicates that Schedule B could also be subsequently modified by the Grantor and Trustee. All of this, again, is subject to the EPA's prior approval of the amount of FR and the affected property, which is addressed by the EPA through the permitting process, of which FR is an integral step.

Moreover, pursuant to the various federal statutes (such as the Anti-Deficiency Act and Miscellaneous Receipts Act), the EPA does not have authority to hold property, and therefore cannot be a signatory to a Trust Agreement.

I would be happy to discuss this with you or with your counsel if you have further questions about our position or Hendry's other options for securing adequate financial responsibility.

Thank you.

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