

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

In the Matter of:)	
)	
Jordan Development Co., LLC.)	Appeal Nos. UIC 18-06
Traverse City, Michigan)	UIC 18-07
Grove #13-11 SWD,)	UIC 18-08
Permit No. MI-051-2D-0031)	UIC 18-09

**RESPONSE TO EPA SUPPLEMENTAL BRIEFING
ON REGION 5'S CONSIDERATION OF ENVIRONMENTAL JUSTICE
UNDER ITS REGULATORY UIC OMNIBUS AUTHORITY**

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INTRODUCTION

This is a response to EPA Region 5's Supplemental Brief regarding Region 5's consideration of Environmental Justice in the issuance of UIC Permit No. MI-051-2D-0031.

Specifically, the Environmental Appeals Board requested Region 5 to "address the following":

"Whether and how, in accordance with the Executive Order on Environmental Justice and Board precedent, the Region exercised its discretion under the UIC regulatory omnibus authority in this permitting action to ensure the protection of the USDWs, including any USDWs upon which a minority or low-income community may rely."

It is my contention that Region 5 failed to exercise discretion under its UIC regulatory omnibus authority to protect USDWs, including any USDWs upon which a minority or low-income community may rely. In addition to this, it failed to perform any meaningful analysis or Environmental Justice Review.

RESPONSE TO ARGUMENTS

Region 5's defense of its decision to award the permit, is, ironically, an admission of failure to exercise discretion and perform a thorough Environmental Justice analysis:

"the Permit conditions would accord protection to all potentially impacted USDWs, irrespective of the community that uses them... the Region did not conduct any further analysis." (EPA Supplemental Briefing, page 1)

Region 5 has used a fallacious argument in order to justify its lack of discretion and analysis. Simply put, it is not possible to argue that "Permit conditions would accord protection to all potentially impacted USDWs irrespective of the community that uses them" unless a great deal of analysis is performed. Specifically, there would need to be a very thorough analysis of both the Gladwin community and the permit conditions, as it is impossible to demonstrate that the Permit conditions are sufficient to protect USDWs without an analysis. Other communities would have to be analyzed as well, as the EPA has argued that community specifics, circumstances, demographics, income level, racial composition, and any other variables simply do not matter.

In defending the lack of an Environmental Justice analysis and its failure to exercise discretion, the EPA has committed a logical fallacy. Specifically, by claiming that the Permit conditions are sufficient to protect USDWs regardless of community, the EPA has committed a "hasty generalization" fallacy. The EPA would need a very thorough analysis to support this claim; unfortunately, the EPA – in its own argument – has admitted that it performed no such analysis, not even on Gladwin, the community which will be affected.

This is a direct violation of the intent and spirit of Environmental Justice guidelines and Executive Order 12898, which states that "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...” (Order at 2)

EPA Region 5 has failed to “make achieving environmental justice part of its mission.” The EPA has failed at the task of “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...”

Environmental Justice regulations and Executive Order 12898 exist for a reason – they protect vulnerable communities. Moreover, the existence of such guidelines is evidence that guidelines governing the permit process are inadequate for protecting low-income communities (and the EPA does acknowledge that this is a low-income community, as the EPA claims to have used EJ Screen to identify potential concerns regarding this community, such as low-income). Indeed, why would EPA Environmental Justice guidelines and Executive Order 12898 exist at all if the permit process and guidelines were adequate to protect all communities in all situations?

When one further parses the EPA argument, it becomes obvious that a number of people at the EPA view Environmental Justice guidelines as irrelevant and unnecessary. Perhaps that is why these guidelines were ignored when granting this permit. It makes sense to ignore Environmental Justice guidelines when permit conditions are already considered beyond reproach, as the phrase “irrespective of the community” would suggest they are. This is a highly inappropriate attitude for people who are tasked with granting EPA permits and given the authority to exercise discretion in permit matters.

Another false claim that the EPA makes in its introduction is that “no commenter presented any claim that the Permit would disproportionately impact the drinking water of minority or low-income communities.”

This is simply not true. Numerous people spoke about poverty and economic problems in the community, including Dr. Ronald Kruske, who also submitted a Petition for Review. Indeed, Dr. Kruske not only discussed poverty in the area, but also cited Environmental Justice guidelines from 2010 and the Safe Drinking Water Act (page 32 of the Public Hearing Transcript, included in the Excerpts the EPA submitted with its Response to Petitions).

Additionally, the EPA included Dr. Kruske’s remarks in its excerpts of comments. It can be found on page 6 of attachment B-8, which is presented as Att. B-8 of the Petition Response (Petitioner Ronald Kruske’s written comments), Dr. Kruske again mentions Environmental Justice, stating that:

“Gladwin and Clare counties consistently rank as two of the most economically depressed counties in the state. Set forth in the 2010 EPA Environmental Justice Guidelines, waste sites cannot be forced into a community that opposes it but simply cannot afford to fight it.” He goes on to cite the 150 people who submitted comments as evidence that the community overwhelmingly opposes this project.

Contrary to EPA Region 5 claims, there were numerous comments received regarding Environmental Justice, low-income status of the community, and risks to USDWs.

I. Response to EPA Argument #1

The EPA's assertion that the permit "includes conditions necessary to ensure the protection of underground sources of drinking water ("USDWs"), consistent with the SDWA and EPA's implementing UIC regulations" is false.

Among other things, this permit allows for a maximum injection pressure of 973 psig, which, according to at least one guidance document from EPA Region #5, is well in excess of the psi necessary to fracture sedimentary rock. "In general, tensile strength for sedimentary rocks is on the order of hundreds of psi." (US EPA Region #5. "UNDERGROUND INJECTION CONTROL SECTION REGIONAL GUIDANCE #7")

That the EPA would allow injection pressures that are several multiples higher than the tensile strength of sedimentary rock is, quite frankly, evidence of serious problems in judgment and a basic technical inadequacy at the EPA. It also demonstrates a callous disregard for public safety, especially considering that literally everyone living in this area depends on USDWs (literally the entire City of Gladwin uses groundwater). Moreover, considering this information came from a Region 5 guidance document, it also demonstrates a basic lack of familiarity with science and EPA positions. This permit should have never been granted in the first place.

The permit also fails to set a limit on injection volume, although high injection volumes have been recognized as another risk for rock fracturing.

The EPA also argues that adequate financial assurance was provided; however, the EPA has not taken inflation and the possibility of accidents into account. Will the money that Jordan Development guaranteed to plug the well be adequate in the future? When, exactly, is this well expected to be plugged? 10 years? 20 years? How many times will the permit be renewed? In the future, will well closing costs remain constant? If there is a spill, leak, or some other problem, will the plugging costs increase?

But the lack of proper analysis remains a central problem.

The EPA states numerous times that it did not conduct further analysis because the permit conditions were adequate. But again, the EPA cannot possibly know if permit conditions are adequate unless an analysis is performed. Moreover, if they are supposed to apply EO 12898 and consider Environmental Justice for the community, taking race, income, and other factors into account, and given that the EPA had already identified this as a low-income community, wasn't analysis warranted?

It should also be noted that much of the case law the EPA cites to justify its decision not to do a review were air quality cases. *In re Knauf Fiber Glass*, 9 E.A.D. 1 (EAB 2000) is an air quality case involving a PSD permit appeal. *In re EcoElectrica*, 7 E.A.D. 56 (EAB 1997) is also a PSD permit appeal involving National Ambient Air Quality Standards (NAAQS).

The EPA is arguing that the Permit conditions are adequate – not just for this community, but "irrespective of the community," and therefore Environmental Justice guidelines and Executive Order

12898 are unnecessary, therefore, no review was performed. By committing to this hasty generalization fallacy, the EPA has essentially argued that it has the liberty to ignore Executive Orders and its own Environmental Justice guidelines.

II. Response to EPA Argument #2

The EPA has argued that Region 5 did not receive any claim during the comment period that the injection well would disproportionately impact the drinking water of a minority or low-income community.

This claim is just a blatant lie. Numerous public comment participants expressed these concerns:

Numerous people spoke about poverty and economic problems in the community, including Dr. Ronald Kruske, who also submitted a Petition for Review. Indeed, Dr. Kruske not only discussed poverty in the area, but also cited Environmental Justice guidelines from 2010 and the Safe Drinking Water Act (page 32 of the Public Hearing Transcript, included in the Excerpts the EPA submitted with its Response to Petitions).

As noted earlier, the EPA even included Dr. Kruske's remarks in its excerpts of comments. It can be found on page 6 of attachment B-8, which is presented as Att. B-8 (Petitioner Ronald Kruske's written comments), Dr. Kruske again mentions environmental justice, stating that:

“Gladwin and Clare counties consistently rank as two of the most economically depressed counties in the state. Set forth in the 2010 EPA Environmental Justice Guidelines, waste sites cannot be forced into a community that opposes it but simply cannot afford to fight it.”

Mr. Kruske goes on to cite the 150 people who submitted comments as evidence that the community overwhelmingly opposes this project.

Mr. Kruske is obviously correct in his assertion that the community is overwhelmingly opposed to this project, as there was an abundance of comments that voiced opposition to this project, and there were a whole bunch of angry people at the meeting. Thus, Mr. Kruske has a preponderance of evidence to support his claim of community opposition.

Another commenter, Mr. Robinson, on page 10 of the public remarks, notes that “our community has certainly seen hard times.” Mr. Robinson, who was an officer in the armed forces and has a Master's Degree in Fishery and Wildlife Biology, goes on to discuss risks to water safety, economic impact, and a number of other concerns (pages 9 – 11 of the public hearing transcript). He asks “How many companies are going to move to Gladwin when their employees are at risk of being subjected to toxins within their water supply...” He cites EPA statistics concerning well failures and even corresponding drops in property values (which also demonstrate the disproportionate economic burden this low-income community is now being asked to shoulder).

Another commenter, Mr. Lackey, actually presents a sample of his own well water (pages 12 – 13), both as a warning of what this project could lead to, and as evidence of pre-existing environmental issues affecting this community (issues which he claims were also caused by oil and gas operations). He concludes his remarks by leaving a sample of his contaminated well water, which he invites the EPA representatives to drink.

Ms. Raymond specifically addresses poverty and USDWs. On page 16 of the public hearing transcript, she urges residents to “test their water now,” and that they “should continue to test to be sure that they are not being poisoned by their well water.” She continues her remarks by noting that “water testing is expensive, and many area residents are hurting financially and do not have the means to pay for this testing. Are they really expected to pay for these tests themselves, while Jordan Development Company is reaping the benefit of this injection well? How is this fair?” Ms. Raymond concludes her remarks on page 17 by noting that “residents are justifiably concerned” because they rely on well water.

It should be also noted (and has been noted numerous times during this appeal process) that the EPA also recommends that owners of private wells “should also test your private well immediately” under a number of situations, one of which is ‘Conditions near your well have changed significantly (i.e. flooding, land disturbances, and new construction or industrial activity).’ (<https://www.epa.gov/privatewells/protect-your-homes-water#welltestanchor>)

Ms. Keith, on page 21 of the public remarks, addresses income status: “And the fact that this is a poor community. Why is it always poor communities that this happens to?”

Ms. Schiele, on pages 36 – 37 of the public comments, discusses the cost of water testing and the financial problems of the community. Specifically, on page 37 she states that one of the water tests costs \$3500:

“Not to mention that that test was going to cost \$3500, and that that was with 10 people in my neighborhood to get that wonderful price of \$3500. And as mentioned, Gladwin is a poor community and we do not have \$3500 to do that.”

On page 25 of the public hearing comments, Ms. Shanahan (who has ovarian cancer) addresses USDWs when she discusses the dangers of hydrocarbons, and states that the hydrocarbons contained in the injectate composition, which is not even listed, are “in the water, and they are going to put it in our ground and channel it to our water, and they are going to kill more children.”

On pages 35 - 36, Ms. Robinson expresses concerns about keeping “our drinking water safe.” On page 46, Mr. Bridle expresses concerns that any leak could contaminate his drinking water well (and Pratt Lake). Ms. Hall, on pages 50 – 51, expresses concerns about drinking water wells, noting that “Michigan has the most private groundwater drinking wells” of all the states. Ms. Hall also expresses concerns that the community had not been properly informed of the meeting and everything felt “rushed” (she heard about it “by word of mouth”) and that the guidelines and approval process are confusing and complicated and serve to prevent people from getting involved in this process.

Indeed, there were a number of concerns that participation in the hearing and approval process was difficult and that community members felt intentionally excluded and powerless, which is, ironically, what EPA Environmental Justice guidelines seek to avoid. Numerous people have claimed that no materials or publications on injection wells were provided. Many people who participated in the Public Comment meeting felt their questions were unanswered.

Perhaps the community would have felt more included had the EPA done a proper Environmental Justice analysis...

Clearly, a number of people in the community noted that Gladwin is a low-income area, with many residents living in poverty, and that they lack both the money to oppose this project, and the money to even perform additional water testing to ensure their well water remains safe. Clearly, lots of people expressed concerns over ground water safety and drinking water contamination (USDWs). The EPA recommends well water testing in this situation. The EJ Screen tool even identified Gladwin as a poor area. Yet the EPA didn't bother to do a full Environmental Justice analysis or exercise any discretion in granting this permit, which is contrary to the aims of EPA Environmental Justice guidelines and Executive Order 12898.

The EPA did not exercise discretion, but it should have. Indeed, argument #2 of the EPA's response begins by invoking 40 CFR § 44.52 (a)(9):

“The Board has noted that ‘when a commenter submits at least a superficially plausible claim that a proposed underground injection well will disproportionately impact the drinking water of a minority or low-income segment of the community in which the well is located, the Region should, as a matter of policy, exercise its discretion under 40 CFR § 44.52 (a)(9) to include within its assessment of the proposed well an analysis focusing particularly on the minority or low-income community whose drinking water is alleged to be threatened.’”
Envotech, 6 E.A.D. at 282.

The EPA simply lies about the record by stating “the Region did not receive even ‘superficially plausible’ claims during the comment period that would warrant exercising the discretion to do further analysis or impose conditions under its regulatory omnibus authority.”

Clearly, this is not true, as there is ample documentation from the public record, especially the public comment hearing, that numerous concerns about USDW contamination and the low-income status of the community were expressed.

The EPA tries to claim that “Petitioner Addison did not raise his environmental justice issues during the public comment period, or cite to where anyone else did.” (EPA Supplemental Brief, page 6)

Again, this is false and misleading. But more to the point, it is misdirection. Any issue raised during the public comment period can be raised in a Petition for Review. It doesn't matter who said what, just so long as it is in the record. Clearly, Environmental Justice concerns were very prominent in the record.

But the EPA is hardly finished mischaracterizing the public record:

“Although there were various comments regarding impacts to the community, these comments did not raise claims that the injection activity would result in impacts to the USDW that would disproportionately endanger low-income and minority communities. Rather, these comments focused on impacts such as negative property values, costs associated with testing of water supplies, and loss of farming and recreational opportunities...”

As already noted, there was an abundance of comments addressing poverty, and there was an abundance of comments addressing USDW contamination.

I would like to again point out that the tool the EPA allegedly used to identify possible Environmental Justice concerns in the area – EJ Screen – did actually list low-income as a concern. So the EPA definitely should have known that low-income and USDW contamination were issues.

In summary:

1. The EPA knew this was a low-income community and that there could be possible issues with USDW contamination, issues which would disproportionately affect this low-income community.
2. Numerous comments were received expressing that this was a low-income community.
3. Numerous comments were received expressing concerns over USDW contamination.
4. EPA guidelines state that “the Region should, as a matter of policy, exercise its discretion under 40 CFR § 44.52 (a)(9) to include within its assessment of the proposed well an analysis focusing particularly on the minority or low-income community whose drinking water is alleged to be threatened.”
5. The EPA failed to exercise discretion, or even perform a proper analysis.
6. When challenged on this permit, the EPA lied, claiming that no comments were received relating to low-income or USDW safety, and therefore, that no discretion was necessary.

CONCLUSION

I have demonstrated that the EPA knew this was a low-income area, that comments were received that directly addressed poverty, and that comments were received that directly addressed USDW contamination and drinking water safety.

Therefore, it would appear that the EPA is covering for its failure to properly handle this permit application and exercise discretion.

For the reasons discussed above, the Board should rescind this permit.

Sincerely,

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STATEMENT OF COMPLIANCE WITH WORD LIMIT

I hereby certify that this response to the EPA Supplemental Briefing on its consideration on Environmental Justice in the matter of Jordan Development Co., UIC Appeal MI-051-2D-0031 contains less than 7,000 words in accordance with 40 CFR § 124.19(d)(3).

Dated: June 21, 2019

Sincerely,

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CERTIFICATE OF SERVICE

I hereby certify that copies of this Response to EPA Supplemental Briefing on Region 5's Consideration of Environmental Justice Under its Regulatory UIC Omnibus Authority in the matter of UIC Class II Permit MI-051-2D-0031, Grove #13-11 SWD, Appeal Number 18-06, 18-07, 18-08, 18-09 were served by Electronic Mail (E-Mail) to the following persons, on the day of June 21, 2019:

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