

**BEFORE THE ENVIRONMENTAL 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

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

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INTRODUCTION

On May 16, 2019, the Environmental Appeals Board (“Board”) issued an *Order Directing Supplemental Briefing on Region 5’s Consideration of Environmental Justice in This Permitting Action* (“Order”). This matter consolidates four petitions for review of Region 5’s final permit for the Grove #13-11 Salt Water Disposal Class II Underground Injection Control (“UIC”) well (“Permit,” Administrative Record (“AR”) 191)). The Order directed Region 5 to answer the following question:

“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.”

Order at 2.

As discussed below, the Permit included conditions sufficient to prevent endangerment of USDWs, as required by EPA’s Class II UIC regulations and as reflected in the record for the Permit. Accordingly, because the Region determined that 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 under its UIC omnibus authority to determine whether additional conditions were needed to protect USDWs in minority or low-income communities. The Region reasonably exercised its discretion to not conduct further analysis or include additional conditions under its omnibus authority, where the record reflected that that the Permit conditions would prevent endangerment of USDWs and no commenter presented any claim that the Permit would disproportionately impact the drinking water of minority or low-income communities.

BACKGROUND

On February 11, 1994, President William Clinton signed Executive Order 12898, “Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations” (“EO 12898”). 59 Fed. Reg. 7629 (February 16, 1994). EO 12898 states in part:

To the greatest extent practicable and permitted by law, and consistent with the principles set forth in the report on the National Performance Review, 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 [EO 12898, § 1-101]

As the Board has explained, there are “substantial limitations” on implementation of the EO in the permitting context, as by its express terms, it may be implemented only in a “manner that is consistent with existing law.” *In re Envotech*, 6 E.A.D 260, 279 (EAB 1996) (quoting *Chemical Waste Management of Indiana*, 6 E.A.D 66 (EAB 1996)). The Board has “consistently interpreted the Agency’s permitting role under the UIC program as being limited to implementing the SDWA and UIC regulations promulgated under the SDWA,” finding that “the Agency has no authority to deny or condition a permit where the permittee has demonstrated full compliance with the statutory and regulatory requirements.” *Id.* at 280. Accordingly, the Board has specifically concluded that “if a UIC permit applicant meets the requirements of the SDWA and UIC regulations, the ‘Agency *must* issue the permit, regardless of the racial or socio-economic composition of the surrounding community and regardless of the economic effect of the facility on the surrounding community.’” *Id.* at 280-281 (quoting *Chemical Waste Mgmt*, 6 EAD at 73 (emphasis in original)).

However, according to the Board, there are two limited areas in the UIC permitting scheme in which the Region has discretion to consider environmental justice issues: in ensuring public participation under Part 124 regulations, and under the UIC regulatory omnibus authority in 40 C.F.R. 144.52. Regarding UIC omnibus authority, the Board has noted that “any exercise of discretion under the UIC omnibus authority is ‘limited by the constraints that are inherent in the language’ of the authority.” *Envotech*, 6 E.A.D at 281. The Board has further explained that “in response to an environmental justice claim, the Region is limited to ensuring the protection of the USDWs upon which the minority or low-income community may rely” and that “[t]he Region would not have the authority to redress impacts unrelated to the protection of underground sources of drinking water, such as alleged negative economic impacts on the community, diminution in property values, or alleged proliferation of local undesirable land uses.” *Id.* at 281-282.

ARGUMENT

I. The Permit includes conditions necessary to protect against endangerment of USDWs, including any upon which a minority or low-income community may rely

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. As the Board has noted, “the overarching purpose of the SDWA and the UIC regulations is to protect USDWs from contamination.” *Envotech*, 6 E.A.D at 260. These regulations include a prohibition on fluid movement into USDWs that would adversely affect the health of persons (40 C.F.R. § 144.12) and specific construction, operation, monitoring and reporting requirements to ensure no such fluid movement occurs (40 C.F.R. §§ 146.22, 146.23). The record reflects Region 5’s technical determinations in establishing the Permit conditions

necessary to meet these regulatory requirements, and thus to prevent endangerment to USDWs, including any USDWs on which a minority or low-income community may rely. *See* Response to Comments (“RTC”) at 3 (AR 183) (“The UIC regulations are designed to protect USDWs from contamination by (1) identifying drinking water sources for protection; (2) making sure the geological siting is suitable for injection; and (3) applying standards for well construction, operation, monitoring and reporting. The permit application and *the conditions in the Jordan Development, L.L.C. Class II permit are consistent with those regulations.*”) (emphasis added); RTC at 9 (AR 183) (“The geologic siting, construction, operation, and monitoring of this well will be sufficient to prevent upward movement of the injected fluid into USDWs and also surface waters.”). These technical determinations and conditions include:

- analyzing the proposed well’s geologic siting, to determine the appropriately protective injection zone and confining zone and only authorizing injection into that injection zone. *See* RTC at 3 (AR 183); Permit at 1 and Part II.A.1 (AR 191)
- imposing permit conditions regarding well construction, including as to well casing and cementing. *See* RTC at 3, 8-9 (AR 183); Permit at Parts II.A, II.B.1.d, III.B (AR 191)
- analyzing the proposed well’s construction, including the “engineering design of the injection well and cement plugs.” RTC at 5 (AR 183)
- imposing permit conditions regarding monitoring, observing, recording and reporting various parameters of well operation and injectate characteristics. *See* RTC at 3, 5-7 (AR 183); Permit at Parts I.E.8, I.E.9.e, I.E.9.f, II.B.2, II.B.3, III.A (AR 191).
- imposing permit conditions regarding periodically testing the well’s mechanical integrity. *See* RTC at 3-4 and 5-6 (AR 183); Permit at Part I.E.17 (AR 191)
- imposing permit conditions that require ceasing injection and notifying Region 5 if the permittee’s monitoring uncovers any leak in the well. *See* RTC at 4, 9 (AR 183); Permit at Parts I.E.9.e, I.E.16 (AR 191)
- reviewing surrounding wells to ensure that no area wells could provide a channel for injectate to migrate above the confining zone. *See* RTC at 4 (AR 183)

- establishing a safe maximum injection pressure. *See* RTC at 5 (AR 183); Permit at Parts II.B.1.a, II.B.1.b, III.A (AR 191)
- evaluating the injectate’s composition and other characteristics. *See* RTC at 6-7 (AR 183); Permit at Part II.B.2.c (AR 191)
- evaluating area seismicity. *See* RTC at 9-10 (AR 183)
- requiring adequate financial assurance to cover the cost of properly closing the well and thereby protect USDWs. *See* RTC at 11 (AR 183); Permit at Part I.E.14 (AR 191)
- requiring a plugging and abandonment plan dictating how the well must be closed. *See* Permit, Part III.B (AR 191).
- requiring that “[t]he underground injection activity, otherwise authorized by this permit or rule, shall not allow the movement of fluid containing any contaminant into underground sources of drinking water, if the presence of that contaminant may cause a violation of any Primary Drinking Water Regulation pursuant to 40 C.F.R. Part 142 or may otherwise adversely affect the health of persons” Permit at Part I.A (AR 191)
- requiring the proper operation and maintenance of the well, including effective performance, adequate funding, adequate operator staffing and training and adequate laboratory and process controls. *See* Permit at Part I.E.5 (AR 191)
- requiring that before beginning injection, the permittee must provide regulators a chance to inspect the well (Permit at Part I.E.10)

Region 5 included these conditions in the Permit to ensure no endangerment to USDWs.

As the Board noted in *Envotech*, “the SDWA proscribes *all* ‘underground injection which endangers drinking water sources,’ regardless of the composition of the community surrounding the proposed injection site.” *Envotech*, 6 E.A.D at 281 (citing SDWA § 1421(b)(1), 42 U.S.C. § 300h(b)(1)). Accordingly, because the Permit included conditions implementing the statutory and regulatory non-endangerment requirements that apply to all USDWs, Region 5 did not conduct a further analysis under its regulatory omnibus authority to determine whether additional conditions were necessary to protect low-income or minority communities that may rely on the USDWs at issue. This was a reasonable exercise of discretion, where the permit conditions

implement regulatory requirements that EPA has determined are necessary to protect public health. *Cf. In re Knauf Fiber Glass*, 9 E.A.D. 1 (EAB 2000) (denying review of environmental justice issues raised in a PSD permit appeal, where the Region noted in response to a comment regarding potential impacts on sensitive subpopulations that the NAAQS are designed to protect public health); *In re EcoElectrica*, 7 E.A.D 56 (EAB 1997) (denying review of environmental justice issues raised in a PSD permit appeal, based on the Region’s modeling showing that emission impacts would be well below NAAQS and thus would have insignificant impacts on the surrounding community).

II. 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

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 C.F.R. §144.52(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.

Here, 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. *See* Region’s Response to Petition for Review at 10-11 (noting that Petitioner Addison did not raise his environmental justice issues during the public comment period, or cite to where anyone else did so). 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 – the kinds of non-USDW impacts that the Board found that the Region could *not* consider under its omnibus authority. *See Envotech*, 6 E.A.D. at 281-282 (“The Region would not have the authority to redress impacts unrelated to the protection of underground sources of drinking water, such as alleged negative economic impacts on the community, diminution in property values, or alleged proliferation of local undesirable land uses”).

In contrast, the comments in *Envotech* more clearly raised environmental justice issues involving cumulative health impacts from multiple sources of environmental contaminants in the community. *See Id.* at 267 (noting that multiple commenters alleged that the area surrounding the well site was “already host to numerous burdensome land issues,” including “leaking toxic waste dumps, belching smokestacks, and seeping gas tanks.”). Here, unlike *Envotech*, the Region did not receive claims during the comment period regarding cumulative health impacts, or any other claims regarding disproportionate endangerment of low income and minority communities from impacts to the USDWs. Therefore, Region 5 reasonably did not conduct further analysis or impose conditions under its regulatory omnibus authority.

CONCLUSION

For the reasons discussed above, and in the Region's Response to Petitions for Review, the Board should deny these petitions for review.

Respectfully submitted,



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Dated: June 12, 2019

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STATEMENT OF COMPLIANCE WITH WORD LIMITATIONS

I hereby certify that the Supplemental Briefing on Region 5's Consideration of Environmental Justice Under its Regulatory UIC Omnibus Authority in the matter of Jordan Development Co., NPDES Appeal MI-051-2D-0031, contains less than 7,000 words in accordance with 40 C.F.R. § 124.19(d)(3).

Dated: June 12, 2019

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Pooja S. Parikh', is written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that the original of this **SUPPLEMENTAL BRIEFING ON REGION 5'S CONSIDERATION OF ENVIRONMENTAL JUSTICE UNDER ITS REGULATORY UIC OMNIBUS AUTHORITY** in the matter **JORDAN DEVELOPMENT COMPANY, LLC OF TRAVERSE CITY, MICHIGAN, GROVE #13-11 SWD, PERMIT NO. MI-051-2D-0031, GLADWIN COUNTY, MICHIGAN, UIC Appeal Nos. 18-06, 18-07, 18-08 and 18-09**, was filed electronically with the Board.

Further, I hereby certify that one copy of this **SUPPLEMENTAL BRIEFING ON REGION 5'S CONSIDERATION OF ENVIRONMENTAL JUSTICE UNDER ITS REGULATORY UIC OMNIBUS AUTHORITY** in the matter **JORDAN DEVELOPMENT COMPANY, LLC OF TRAVERSE CITY, MICHIGAN, GROVE #13-11 SWD, PERMIT NO. MI-051-2D-0031, GLADWIN COUNTY, MICHIGAN, UIC Appeal Nos. 18-06, 18-07, 18-08 and 18-09**, was sent to the Petitioners and Permittee, via email pursuant to Board order, to the following addresses:

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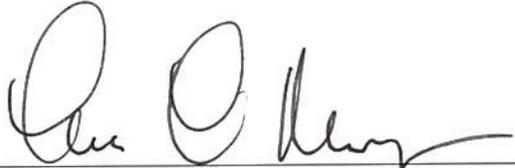
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