Matthew Tejada
Director
Office of Environmental Justice
USEPA Headquarters
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N. W.
Mail Code: 2201A

Washington, DC 20460

April 27, 2015

Dear Director Tejada:

The undersigned representatives of Ohio communities and environmental organizations are writing to you to ask your Office to intervene to prevent what we believe are clear environmental justice abuses cognizable under Executive Order 12898 being committed in our state.

These abuses are being committed in low income areas of Ohio under the authority of federal law contained in the Safe Drinking Water Act's ("the Act") Class II Underground Injection Control ("UIC") Program for injection wells disposing of oil and gas wastes through US EPA's remarkably inadequate delineation and oversight of the Class II UIC program delegated to the Ohio Department of Natural Resources ("ODNR"). In particular, U.S. EPA is tolerating undeniably inadequate public participation and enforcement in low-income, rural Appalachian areas of Ohio where injection wells are being sited rapidly and recklessly by ODNR pursuant to this federal delegation.

OVERVIEW OF THE SECTION 1425 CLASS II UIC PROGRAM IN OHIO

I. The Profoundly Weak Federal Requirements for Class II Injection Well Delegation under Section 1425 of the Safe Drinking Water Act.

Ohio shares the unfortunate status with twenty-two (22) other states[1] of having a delegated UIC program under the negligibly defined program created by Section 1425 of Part C of the Safe Drinking Water Act. Section 1425 was adopted when the Act was amended in 1980 and created a sweetheart program for the oil and gas industry that allows states to receive federal delegation under a streamlined program with minimal safeguards. However, U.S. EPA's errors and neglect in implementing the Section 1425 program have greatly multiplied Congress's lapse in enacting Section 1425 initially.

These implementation failures are plainly evident in the fact that US EPA has *never adopted regulations* governing the delegation process under Section 1425 in the thirty-four (34) years since its enactment. In the absence of any rules, US EPA has instead ostensibly implemented the program pursuant to a minimally defined guidance document that was

[1] http://www.epa.gov/ogwdw/uic/pdfs/Delegation%20status.pdf

adopted in 1983.[2] This simplistic guidance has *never been amended* in the thirty-one (31) years since its adoption. We are not aware of any current efforts at US EPA to either adopt regulations to implement Section 1425 or to update the 1983 guidance.

The Agency's failure to provide basic regulatory definition for Section 1425 delegation at the federal level has not been remedied by its state level implementation in Ohio. Unlike the more rigorous, initial form for federal program delegation under Sections 1421 and 1422 of the Act, the Section 1425 program allows states to regulate Class II wells using their own program requirements rather than following minimum EPA regulations. Ohio received its Class II UIC delegation in 1983[3] and this delegated program is being implemented pursuant to a simplistic, twelve-page Memorandum of Agreement between Region V and ODNR that was signed in March, 1984. That agreement has not been substantially amended in the thirty (30) years since its initial adoption.

US EPA's failure to responsibly implement Section 1425 is evident from the mere recitation of the facts in the preceding paragraphs. This history of failure has no parallel in any other program administered by US EPA. The dismay and shock of Ohio citizens facing environmental harm from Class II injection wells when they first become aware of these elemental facts regarding this so-called "regulatory program" under Section 1425 is almost impossible to describe to you.

II. The Federal 1425 Program Has Ignored the Fundamental Changes in the Injection Well Program Caused by Horizontal Shale Wells, also known as "Fracking."

As recounted above, the federally delegated program requirements for Class II underground injection control in Ohio have been frozen in place for over three decades at a nominal level. As you are no doubt aware, the scope and environmental risk of oil and gas field waste disposal has certainly not stayed remotely as static.

In Ohio, horizontal shale drilling, better known as "fracking," has completely transformed the oil and gas industry in the last four years. In that time, Ohio has gone from no horizontal "fracked" wells to 584 in production by the end of the second quarter of 2014.[4] The amount of oil and gas production wastes generated by horizontal fracked wells is dramatically greater than previous production wells with each fracked well requiring an average of 6.5 million gallons of water and chemicals to frack initially.[5] It also appears that most, if not all, of these wells will be "re-fracked" one or more times to remain productive with a corresponding generation of millions more gallons of highly contaminated, toxic fracking wastewater for each well. Estimates of the amount of this contaminated water that "flows back" to the surface as waste that must be then be disposed range from 30% to 70%.[6]

[2] http://www.epa.gov/ogwdw/uic/pdfs/guidance/guide_uic_guidance-19_primacy_app.pdf
[3] 49 FR 46896
[4] http://oilandgas.ohiodnr.gov/production
[5] Figure generated from data in Fracfocus, at http://fracfocus.org/.
[6] U.S. Department of Energy, Office of Fossil Energy and National Technology Laboratory, *Modern Shale Gas*

All of this disposal in Ohio takes place in injection wells authorized pursuant to the token Section 1425 delegation scheme.

To meet this radically increased disposal volume, the number of Class II injection wells permitted in Ohio has grown from 144 to 240 over the past four years. Over that same time, the quantity of wastewater disposed in Ohio injection wells has increased from 12,597,115 barrels in 2011 to 24,911,564 barrels in 2014.[7] This quantity will significantly increase as horizontal well drilling matures in Ohio through current efforts to increase pipelines and mid-stream facilities.

It is not this radical increase in overall volumes of wastes disposed in Ohio Class II wells alone that confronts Ohioans, but also the greater toxicity of the waste fluids caused by the mass use of chemicals in the hydraulic fracturing process. Nothing in US EPA's Section 1425 program addresses the unique public health and environmental risks of the fracking chemicals being injected here. Also, Ohio does not even require the chemicals used to be disclosed until sixty (60) days after drilling operations are completed, see Ohio Revised Code 1509.10(A). As a result, these chemicals will not be publicly disclosed until after the contaminated flowback wastewater has been injected, which leaves the affected community with absolutely no opportunity for knowing what is being injected through and beneath their water supplies. Further exacerbating this lack of public health disclosure under Ohio law, the General Accounting Office recently reported[8] that Ohio is the only state of eight major oil and gas producing states studied that requires absolutely no testing of the chemical contaminants in oil and gas wastes to be injected before permitting injection wells.

Compounding this problem are radical and unprecedented "trade secrecy" protections for fracking chemicals. In Ohio, a well owner now unilaterally chooses whether it will declare any of its chemicals as "proprietary" and does not even have to disclose the chemical's risks to any office of the state government, thereby effectively concealing the risks presented by these chemicals, see Ohio Revised Code 1509.10(I). Due to these state provisions - which no federal requirement in the delegation process even addresses - the federally approved Class II program in Ohio utterly fails to address these massive amounts of haphazardly identified toxic chemicals. Historically, such miserable or corrupt policy decisions at the state level have been prevented by minimum federal requirements. However, that fundamental safeguard is simply absent in the 1425 program in Ohio.

In addition to chemical wastes, flow back from these deep wells is also routinely contaminated by radioactive materials that present an entirely new set of serious environmental and public health dangers. Nothing in the Section 1425 program addresses these radioactive wastes as well.

Development in the United States: A Primer, DE-FG26-04NT15455, April 2009, p. 66, http://fossil.energy.gov/programs/oilgas/publications/naturalgas_general/Shale_Gas_Primer_2009.pdf.

[7] Numbers compiled from fee reports filed by injection well operators with ODNR.

[8] GAO-14-857R, Drinking Water: Characterization of Injected Fluids Associated with Oil and Gas Production, Sept. 23, 2014.

As the federal Section 1425 program has been frozen in place for three decades and has not seen the slightest change in response to any of these new dangers caused by horizontal shale drilling, we believe you can readily understand why the public distrust of the federally delegated Class II program is deep and red hot in this state.

Because of the lack of program definition and modernization, the Class II injection well programs delegated by US EPA under Section 1425 are open invitations to persistent environmental injustice. As the next section explains, that open invitation has been fully exploited in Ohio's Class II UIC program and has caused disproportionate impacts on low-income rural Appalachian communities in our state.

ENVIRONMENTAL JUSTICE IMPLICATIONS

The Class II UIC Section 1425 program in Ohio has public participation requirements so inadequate that they would be comical but for the profound injustice they cause, provides unreliable and inadequate information to the public on the environmental risks inherent in the waste injection program, and has a long-standing history of federal oversight that is too weak and indifferent to ensure meaningful enforcement at the state level where low-income communities are put at risk. These considerations are directly related to your Office's responsibilities under Executive Order 12898. Also, since the sole federal 1425 delegation guidance document of 1983 and the Memorandum of Agreement of 1984 have both remained stagnant since their adoption, these policies in no way reflect the environmental justice considerations that were adopted in Executive Order 12898 in 1994. Given their outdated, neglected status, it is no surprise that the Section 1425 program does not address the disproportionate impacts of Class II injection well disposal on Ohio's low-income, rural Appalachian communities.

I. Disproportionate Impacts on Ohio's Low-Income Appalachian Communities.

The federal Appalachian Regional Commission has officially recognized thirty-two (32) Ohio counties[9] as being part of Appalachia due to their history of geographical isolation and economic depression. These thirty-two counties comprise 36% of Ohio's eighty-eight counties. Based on the most recent (July, 2009) figures from the Appalachian Regional Commission,[10] these 32 Appalachian counties are the home for 17.4% of Ohio's total population.

Based on the Data Sheet of December 1, 2014, prepared by the ODNR's Division of Oil & Gas Resources Management, Ohio, copy attached, ODNR has permitted 237 total Class II injection wells statewide, of which 199 are currently injecting waste. Of these 199 active wells, 149 – or 74.9% of the total - are located in Ohio's thirty-two Appalachian counties.

[9] Adams, Ashtabula, Athens, Belmont, Brown, Carroll, Clermont, Columbiana, Coshocton, Gallia, Guernsey, Harrison, Highland, Hocking, Holmes, Jackson, Jefferson, Lawrence, Mahoning, Meigs, Monroe, Morgan, Muskingum, Noble, Perry, Pike, Ross, Scioto, Trumbull, Tuscarawas, Vinton, and Washington. See http://www.arc.gov/counties and also Ohio Revised Code 107.21

[10] http://www.arc.gov/reports/custom_report.asp?REPORT_ID=40

As for the remaining thirty-seven (37) permitted but not-yet active wells, these are identified in ODNR's December 9, 2014, map entitled "Class II Brine Injection Wells of Ohio," copy attached. This map identifies an additional fifteen wells in Ohio currently being drilled and an additional twenty-two (22) wells in Ohio that have permits but have not been drilled. Of the fifteen wells being drilled, all of them, or 100%, are in Appalachian Counties (Ashtabula, Trumbull, Mahoning, Tuscarawas, Guernsey, Monroe and Meigs Counties) and 9 of the 22 permitted wells are in Appalachian counties for 40.9%% (Trumbull, Mahoning, Tuscarawas, Harrison, Muskingum, Guernsey, Noble and Washington Counties). For total wells permitted in Ohio (237), 173 are in Ohio's 32 Appalachian counties, or 73%.

As the Appalachian 17.4% of Ohio's population (and 36% of counties) possess almost three-quarters (74.9%) of Ohio's active Class II injection wells and 73% of all permitted wells, it is clear that ODNR's injection well program has a disproportionately high and adverse environmental impact on Ohio's low-income communities. ODNR's Class II injection well program is therefore well within the parameters of Executive order 12898 which requires federal agencies to develop environmental strategies to address disproportionately high and adverse health and environmental impacts on low-income populations.

This disproportionate impact should be a particular concern to your office. As you are aware, the EPA Office of Environmental Justice defines environmental justice as the:

> "fair treatment of people of all races, cultures, income and educational levels with respect to the development, implementation and enforcement of environmental laws, regulations and policies. Fair treatment implies that no population of people should be forced to shoulder a disproportionate share of the negative environmental impacts of pollution or environmental hazards due to a lack of political or economic strength." Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (59 FR 7269, February 16, 1994).

To meet this goal, the Order imposes the mandate that:

> "[E]ach 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 and low-income populations in the United States and its territories..."

Environmental justice considerations are a particularly appropriate inquiry in the permitting and enforcement of Class II injection wells because Ohio's low-income Appalachian communities are disproportionately subject to serious environmental risks from these injection wells. These risks range from spills of toxic (including radioactive) fracking fluids, contamination of water supplies by fracking fluids through inappropriate geological siting or well failures, earthquakes, and the leakage or exposure to harmful volatile chemicals from open pools storing fracking waste. Nearby communities experience the brunt of these risks while receiving no economic benefit.

Appalachian communities also possess comparatively fewer emergency response forces, many of whom are volunteers with inadequate training and equipment for the largely unknown risks involved. As noted above, large scale fracking waste disposal involves exotic new chemical compounds of untested toxicity and whose identity is frequently concealed by Ohio's adoption of an extremely one-sided law in 2012 that singled out the fracking industry to obtain nearly unrestrained concealment of the identity of these chemicals under the guise of "proprietary information," see Ohio Revised Code 1509.10(I).

These serious local problems are all exacerbated by US EPA's failure to implement the Section 1425 delegation program effectively. When US EPA approved Ohio's primacy over Class II injection wells, it is apparent that it failed to consider the undue burden that would ensue to low income Appalachian communities. In the twenty years since Executive Order 12898 was adopted, those policies were never amended to address the environmental justice implications of the weak Section 1425 program. With the advent of widespread horizontal shale drilling, the impacts from that series of defaults are now greatly magnified and pose a direct threat to Ohio's low-income Appalachian communities which US EPA has yet to recognize or address.

As provided in Executive Order 12898, US EPA must adopt strategies designed to insure that these Ohio communities are provided with:

1) ample access to relevant and reliable information on injections wells,
2) meaningful opportunities for public participation in their permitting process, and
3) effective enforcement of this federally delegated programs.

As the following sections make clear, none of these environmental justice goals are being met in the Appalachian areas of Ohio that are being disproportionately impacted by the Section 1425 injection well program.

II. Inadequate Public Notice and Public Participation

Although adequate public notice and public participation are hallmarks of the Federal Government's commitment to environmental justice, they are barely present in the formal Section 1425 program and even that marginal situation is deteriorating rapidly in Ohio. US EPA's guidance barely addresses these issues (at pages 21-22), but even those minimal requirements have been all but ignored by ODNR without consequence.

The public notice and participation provisions in Ohio are contained in Ohio Administrative Code ("OAC") Section 1501:9-3-06(H). Paragraph (H)(1) provides that public notice of the filing of an injection well permit shall be provided by the publication in a newspaper of general circulation in the affected county for not less than five consecutive days and in a weekly circular available to county engineers. A copy of that notice is also to be provided to all "owners or operators of wells" within either a one-quarter or one-half mile radius around the proposed injection well – although to no members of the public living within that radius. Paragraph (H)(2) then provides that comment may be provided by the public *on the application* (i.e., not on the draft permit) *within 15 days* of the last day that the

notice was published in the local newspaper. If any such comments are made, then the chief of the ODNR division must rule on the "validity" of the comment, and in the event he finds it valid, the individual commenter alone (not the public in general) may attend a hearing with the chief on the objection. While the Ohio Administrative Code provides for publication in a newspaper of general circulation in the affected county, this did not hold true in a recent permit issued by ODNR for an injection well in Monroe County, Ohio. The well was being converted from a production (dry) to a class II injection well and even though the well is located in Monroe County the public notice appeared in Washington County.

This process clearly does not constitute "meaningful" public notice and participation as required in Executive Order 1298. Indeed, this system has no practical use at all to the people of Ohio, especially in light of how it has been implemented at ODNR. This is because:

First, the strongest part of the system, the newspaper notice, is unlikely to result in effective communication of the pending application to the people of the affected region. It is considerably weaker than the state's own system of public notice of oil and gas production well permits in urban areas where notice must be provided to any homeowner within 500 feet of the well as well as to local mayors and township trustees, see Ohio Revised Code 1509.06(A)(9).

Second, there is no reliable method by which a potential commenter can obtain the application before the expiration of the token 15 day comment period. While the newspaper notice is to indicate how more information can be found from the applicant or ODNR, there is no mechanism for insuring that the application will be provided in a timely fashion. No duty is placed upon the applicant to provide the application and it is the experience of the undersigned that ODNR is currently taking over two months to respond to public records requests. Most potential commenters would arrive at the expiration of the 15 day period with nothing in hand to comment upon.

Third, the only record available during the comment period might be the application but there would be no permit to give context to the application. Issues for comment generally arise once a potential commenter sees how the state is addressing potential problems in an actual permit document. Accordingly, under this system, comments are reduced to guesswork and the chance that the chief would subsequently find those comments "valid" for convening a hearing becomes a slim possibility – even if the chief approached those determinations in good faith, see below. Indeed, this system is the only federal program that we are aware of where comments are to be provided when a draft permit is lacking and it appears designed to make those comments immaterial.

Fourth, a fifteen day comment period is grossly inadequate on its face in light of the complex geologic, hydrogeologic, and engineering issues presented by injection well permits. A commenter would be required to hire professional experts to analyze the application which cannot be done in such a restricted timeline. Also, the ODNR

regulation allows no discretion for an extension of this minimal period. No other program delegated by US EPA has a 15 day comment period.

Fifth, in practice, the ODNR chief is routinely not finding comments "valid" and is therefore routinely refusing hearings requested by the public. The most notorious example is from Athens County in late 2013 where over a hundred comments were submitted to ODNR requesting a public hearing, a request even reiterated by the local county commission. The request was denied without explanation – even though the well application involved was proposing the largest disposal volume in Ohio. The Athens County Commission subsequently convened its own public hearing on the injection well at which over a hundred people attended in an attempt to cover US EPA's delegated agency's default. To our knowledge, no public hearing has been conducted by ODNR on an injection well anywhere in Ohio.

Sixth, ODNR's public "participation" process with the chief allowing a public hearing only after unilaterally screening comments and finding them "valid" without explanation, is far weaker than the system outlined in US EPA's 1983 guidance document. Paragraph e.2.A on page 22 provides that "The State program should provide opportunity for a public hearing if the Director finds, based upon requests, a significant degree of public interest." If this standard were in place in Ohio, a public hearing as requested by the people of Athens County described in the previous paragraph would certainly have been held. However, ODNR has not been challenged by US EPA for this significant variation from the guidance that has led to public participation in Ohio becoming illusory. This incident raises a serious question whether this guidance, that forms the only basis for delegation of the Section 1425 program, is taken seriously at all within the implementing agencies, including by U.S. EPA itself

Seventh, ODNR also refuses to follow the 1983 guidance – and again without any challenge from US EPA – by ignoring Paragraph e.3 on page 22 that "The final State action on the permit application should contain a 'response to comments' which summarizes the substantive comments received and the disposition of the comments." To our knowledge, only a nominal number of responsiveness summaries have ever been prepared by ODNR, perhaps only one.

Eighth, ODNR has within the past year unilaterally changed its permit issuance program for Class II injection wells in a very fundamental way that clearly exposes that agency's contemptuous disregard for meaningful public participation. Until approximately a year ago, ODNR issued a single permit to each injection well to which the public notice by newspaper notice and its vestige of a potential public hearing applied, and most importantly, to which appeal rights for affected persons attached. However, in 2010, the Ohio legislature abrogated long-standing Ohio law that universally allowed permit appeals in another sweetheart statute for the oil and gas industry by exempting drilling permits for production wells in Ohio Revised Code 1509.06(F), later confirmed by the Ohio Supreme Court in *Chesapeake Exploration, LLC v. Oil & Gas Commission, et al.*, 135 Ohio St.3d 204, 985 N.E.2d 480, 2013-Ohio-224 (Jan. 30, 2013).

At some unknown point within the past year, ODNR – without any public announcement and without even changing its permit regulation in Ohio Administrative Code 1501:9-3-06 – surreptitiously altered its permit scheme into a bifurcated system with an initial drilling permit, which it now claims is not appealable pursuant to Ohio Revised Code 1509.06(F), and a second and clearly ministerial permit that authorizes the commencement of actual disposal after the well passes a fifteen minute pressure test.

The artifice behind this new system is that, because the Supreme Court case expressly held in the *Chesapeake Exploration opinion* that "injection well" permits were appealable, ODNR calls this second ministerial permit the appealable "injection well" permit while the far more important provisions of the now purportedly unappealable initial permit, where all the critical geological and engineering determinations are found, is to be immune from public review. In taking this position, ODNR is acting as if it is oblivious to the facts that the second permit has no public notice or comment opportunities whatsoever, and that, as the issuance of the second permit is never publicly noticed to the affected public, the public cannot as a practical matter appeal the permit before the jurisdictional thirty (30) day appeal deadline in Ohio Revised Code 1509.36 expires. On June 12, 2014, the Ohio Oil & Gas Commission that hears these permit appeals upheld this new, bifurcated system and handed ODNR its goal of immunity from public accountability in its Section 1425 program when it dismissed an appeal of the critical "initial" permit, copy of opinion attached. That regrettable decision is now under appeal, but the scenario dramatically demonstrates the extent and underhanded nature to which ODNR is willing to go in order to avoid meaningful public participation and accountability and perpetuate environmental injustice to the disproportionately affected, low-income residents of Appalachian Ohio.

Although Region V has been made aware of this change, it has made no public effort to restore the public's rights to meaningfully participation in injection well permitting decisions in their communities. This situation reveals that the environmental justice goal of meaningful public information and participation is openly scorned in the implementation of Ohio's Section 1425 program. The success of this artifice to date is only possible because the 1983 guidance does not insure public appeal rights in the delegated program, instead only providing the vacuous statement on page 21 that: "It is assumed that most States already have legislation that governs public participation in State-decision making and defines such processes as appeals, etc." Allowing critical program components to be determined merely by content-free statements like this underscore the previous observation in this letter that the Section 1425 program is an open invitation to environmental injustice.

III. Inadequate US EPA Oversight of a Failed State Enforcement Program

ODNR's enforcement program has no priority, is minimal in effort, and is clearly inadequate to deter violations at the state's Class II injection well sites. Its principal civil

enforcement tool is contained in Ohio Revised Code 1509.04(G) which authorizes a referral to the Ohio Attorney General or local prosecuting attorney for injunctive relief and, pursuant to Ohio Revised Code 1509.33, for civil penalties ranging from $2,500 to $20,000 per violation. Ohio Revised Code 1509.99 adds criminal penalties to the possible penalties following a formal request from ODNR. However, no such requests have been made by ODNR for either civil or criminal prosecution under this authority. The ODNR program does not have authority to impose administrative fines independently.

Ohio Revised Code Section 1509.04 also provides ODNR with wide-ranging authority to suspend or revoke injection well permits. We are aware of only a single incident where this authority has been used by ODNR against an owner or operator of an injection well which was the novel episode of an injection well owner in Youngstown who was criminally prosecuted by U.S. EPA for illegal waste dumping into a sewer

The only enforcement related activity that we are aware of is that inspectors may identify violations at injection well sites and record the fact in their inspection reports, but their only action taken in regard to these violations is to notify the operator and ask them to remedy the violation with no sanctions attached. Whether the violations are resolved is seldom documented in Department files. We also have noted a pattern that injection well sites where local citizens or newspapers actively follow a well's status are inspected periodically, but sites without focused public interest (which are the vast majority of sites) are likely to be ignored by ODNR inspectors. Such a minimal enforcement effort is incapable of deterring violations and has created a climate where violations are tolerated and their significance studiously minimized by the political leadership at ODNR.

There are two particular circumstances that highlight this phantom enforcement program at ODNR that leaves Ohio's Appalachian communities disproportionately at risk. A frequently noted violation at injection well sites is that the annulus, or open space within the well casing surrounding the injection tube, is not kept at a pressure greater than the pressure in the injection tube itself. The purpose of this requirement is that the greater annulus pressure will assist in limiting any leak in the injection tube and force the leaked fluid down into the injection zone. A simple review of ODNR's on-line database, copy attached, shows that this requirement is routinely violated with 3,944 formally recorded incidents of annulus pressure being less than injection pressure since 2001. No enforcement action has been taken for any of these nearly 4,000 violations. As a result, Ohio's Appalachian communities are being exposed to a preventable risk of contamination.

Another chronic area of non-compliance is ODNR's avoidance of its obligation to require the closure and plugging of non-functioning or abandoned wells of all kinds (including production wells that are not governed by the UIC program, but which allow a pathway for contamination from leaking injection wells). ODNR is required to obtain the plugging of these wells after they are taken out of use to limit their potential for rapidly spreading groundwater contamination. However, ODNR appears to be avoiding this important obligation through a de facto policy of declaring that only wells "incapable of use" due to deterioration or damage, are to be considered abandoned, even if they have not been used for

an extended number of years and there is no intent ever to use them again. Also, even when "plugging orders" are issued by ODNR, they are not followed up upon to enforce compliance but rather are reissued indefinitely or the matter is just dropped.

This lack of enforcement was documented in a June 1, 2014 story in the *Columbus Dispatch* titled "Oil, gas wells often keep operating despite violations," which found that many wells cited for violations have remained in violation for years without any follow-up action. The Department's explanation for its inaction is noteworthy: that many of these violations are "a low priority" because "they are idle wells that need to be permanently closed." In other words, they are wells that the state should be requiring to be plugged but the Department concedes it has simply given up on that duty. The Department justifies this stance by saying simply that these open wells "probably pose no imminent environmental threat." This failure to enforce the plugging requirement is also a concern for injection wells, because according to ODNR's December 9, 2014, map of injection wells, only two are classified as plugged, even though many of these wells have been in operation for decades and are aged.

One clear reason for the inadequate enforcement program is that the ODNR program is notoriously understaffed. ODNR's Oil and Gas program, of which the UIC program is a part, has suffered devastating staff decreases since 1987 when it had 124 full-time equivalents to a low of 35 in the late 2000's before the fracking boom in Ohio. The program's enforcement program during the 1980's was handled by a specialized unit organized specifically to meet the unique demands of enforcement; this unit was eliminated during these cuts and has not been restored leaving ODNR with no oil and gas program staff dedicated exclusively to enforcement. During this same period, the UIC program staff was reduced from 20.85 full-time equivalents to just 3.18. The current staffing needs of the UIC program seem to be met by sharing staff from the larger program rather than having its own dedicated staff.

The larger oil and gas program has slowly restaffed over the past four years to approximately 120 staff members. However, only 50 of those positions are for inspectors that are critical for maintaining an enforcement program. Even ODNR admitted publicly over two years ago that it needed 90 inspectors, or almost double its current number, see *Cleveland Plain Dealer*, May 10, 2012, "Drilling Inspectors needed: Ohio looks to hire as shale play spreads to more counties." In this article, ODNR announced it would meet this staffing goal by early 2013, but it has added only twenty additional inspectors since then, not the sixty it said are needed. ODNR further admitted in this article that it had only inspected 18% of the state's operating wells (of all kinds) in 2011, leaving more than 50,000 unchecked that year.[11] This rate was the lowest of four major producing states reviewed in the article (Pennsylvania, Texas, Colorado and Oklahoma).

[11] This number cited in the *Plain Dealer* refers only to actively operating wells and does not include inactive wells that are almost never inspected. There are approximately 150,000 such inactive wells in Ohio.

According to ODNR, only four inspectors are currently dedicated to the UIC program statewide. Most of the inspectors' time is spent on functions related to serving the industry's needs related to permitting, such as observing cement jobs and mechanical integrity tests, so that little time remains available to them for enforcement related activities. Other environmental justice related components of the ODNR program remain starved of staff resources and are given an even lower priority than inspectors, such as staff to respond to public records request within a reasonable time frame or to conduct the now non-existent public hearings or responding to public comments.

As will be discussed below, US EPA's periodic reviews of the Ohio Section 1425 program have flatly ignored these enforcement deficiencies and even the state's history of debilitating staffing problems. Accordingly, the environmental justice goal to "promote enforcement of all health and environmental statutes in areas with minority populations and low-income populations" is being ignored by US EPA in regards to Ohio's Section 1425 program.

IV. Regulatory Capture of Ohio's 1425 Program by the Oil and Gas Industry

The significance of the information above cannot be fully appreciated without your Office's consideration of a recent incident that exposes the underlying bias of Ohio's Class II UIC program as being implemented hand-in-hand with the oil and gas industry with an explicit goal of freezing out all expressions of legitimate public concern. The incident was the disclosure in February, 2014, of a ten-page "Communications Plan" dated August, 20, 2012, (copy attached) drafted by ODNR to influence Ohio public opinion to favor the Department's partnering with the oil and gas industry to "proactively open state park and forest land to horizontal drilling/hydraulic fracturing . . ." (p. 1).

A stated goal of this plan is to overcome "zealous resistance by environmental activist opponents, who are skilled propagandists," who are subsequently called "eco-left" pressure groups, see p. 1. These groups are later identified by name on page 5 under the heading "opposition groups" and includes virtually every group that works with Ohio communities in their concerns over fracking, including long-standing national organizations such as the Sierra Club and the Natural Resources Defense Council.

This public relations strategy presumes that absolutely all expressions of concern over the environmental risks created by fracking are illegitimate and unworthy of the Department's consideration. The strategy also identified the "allied" groups that ODNR will work together with on this campaign against the "eco-left" which includes the oil and gas industry's main lobbying and umbrella groups, the Ohio Oil and Gas Association and America's Natural Gas Alliance, and even singles out the Halliburton corporation as a cooperating partner with ODNR (p. 5). Subsequently disclosed documents also established that this one-sided, industry-friendly and public-adverse public relations program was discussed multiple times within the Governor's office itself.

Seldom does the public, or the responsible authorities at US EPA, obtain such a deep and utterly candid insight into the inmost motivations and mindset of its state agents responsible for implementing a federally delegated program. This document establishes ODNR's explicit intent to identify itself unreservedly with the oil and gas industry while placing itself in unyielding, reflexive opposition to citizen concerns with fracking. All expressions of concerns about the fracking industry or with ODNR's programs are, as a matter of express policy, to be dismissed as illegitimate "propaganda" and ruthlessly countered.

ODNR has confirmed for you that it will not consider the environmental concerns of Ohio's disproportionately impacted communities as worthy of consideration. The Department's policies to repress public information and public participation, and avoid exposing the industry to accountability for violations, are direct extensions of this underlying policy. Usually your Office must infer the presence of environmental injustice from surrounding circumstances, but ODNR's public relations strategy document has established its intention to systematically deny environmental justice to Ohio's Appalachian communities as an admitted fact.

V. US EPA's Oversight of ODNR's Section 1425 Program is Woeful

The two main documents for US EPA oversight of this state of affairs in an annual report from ODNR to Region V and periodic audits by the Region conducted approximately every five years. Attached is ODNR's annual report for federal fiscal year 2010 covering its actions to meet its grant commitments. It is less than a page and a half. It provides the barest summary of the program's enforcement activity, makes no reference to any public participation or outreach activities of any kind, and makes no reference to the overriding program limitation of the UIC's staffing level at that time (barely over 3 full-time equivalents). This report was filed before the advent of fracking in the Midwest that subsequently caused the UIC programs' permitting activities to radically increase. It effectively communicates the superficial level of accountability that Region V required of ODNR's Section 1425 program.

The audits conducted by Region V of ODNR's program were even more superficial, however. Attached are the last two audits conducted in 2005 and 2009 of some dozen pages each. About all your Office needs to know about these audits is that it is readily apparent that the 2009 audit is a mere cut-and-paste from the 2005 audit with negligible changes in wording and none at all in conclusions and in effusive, fact-free praise. There is no critical attitude expressed at any point in these audits nor is there any statistical analysis to justify its overwhelmingly rosy assessments. There is not a statement in either audit that ODNR would feel the slightest discomfort with or any need to contest.

From an environmental justice perspective, the audits show no awareness of the objectives of Executive Order 12898. Only the 2009 audit contains a reference to public participation activity which is a single public meeting in Ashtabula County which does not even appear related to a permitting process. The 2005 audit mentions only a single odd incident of the state responding to a citizen complaint but nonetheless both audits jump to a

conclusion that the program's responsiveness to the public is "effective." The enforcement discussion praises the Division, especially for its use of computerized record keeping and "field presence" (2005 audit, p. 6), but glosses over the fact that the Division has never made an enforcement referral and only uses its weakest forms of enforcement through mere violation notices issued by inspectors with questionable deterrent effect. To cap off the audit's efforts to avoid even the mention of unpleasant facts, only the 2005 audit even mentions the program's critical staffing crisis in stating that its "suggests DMRM consider hiring additional support staff and entry-level technical staff to assist the UIC program" (p. 12) without even mentioning that the program's staffing had been slashed from 20 to 3; the 2009 audit ignores this fundamental problem entirely.

A cursory review of the audits is all that is needed to demonstrate their superficial, unrestrained "gushy" quality and their failure to reflect the environmental justice considerations of Executive Order 12898. These audits were before the advent of fracking in Ohio that radically increased the Ohio public's demands for accountability from the UIC program. These audits demonstrate US EPA's failure to comply with Executive Order 12898's requirements for environmental justice in regards to the Section 1425 UIC program in Ohio.

One final episode will provide the capstone for demonstrating Region V's feckless lack of oversight of its delegated UIC program in Ohio. Hearing the frustration from Ohio citizens arising from the utter lack of public participation in ODNR's injection well program, the Buckeye Forest Council, the Ohio Sierra Club and the Center for Health, Environment and Justice sought to compensate by holding public hearings in Portage and Athens Counties to allow citizens to bring forth their complaints on dealing with ODNR and the injection wells in their communities. At the end of the two public hearings, these groups sent all comments and accompanying documents to US EPA, Region V in September, 2013. To date, no response whatsoever has been received from Region V on this information that corresponds to the very heart of the environmental justice considerations embodied in Executive Order 12898.

CONCLUSION

The undersigned representatives of the Ohio environmental community ask your Office to investigate US EPA's failure to protect the nation's environmental justice goals for Ohio's low-income, Appalachian communities facing a disproportionate risk from Class II injection wells. To be very frank, Ohioans need your help desperately to install the values of environmental justice into Ohio's Section 1425 UIC program. We will cooperate with your Office in this investigation and urge you to conduct it promptly.

We are confident that your investigation will result in findings documenting US EPA's failings and recommendations to bring the implementation of this rogue program back within its federally required duties and obligations to low-income Ohioans. Your assistance in insuring that the people of Appalachian Ohio are accorded their full portion of human

respect and protection envisioned by Executive Order 12898 is most appreciated by ourselves and by countless thousands of our fellow Ohioans.

Thanking you in advance,

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Betsy Cook - Southeastern Ohio Fracking Interest Group. Washington County, Ohio
Heather Cantino - Buckeye Forest Council. Statewide
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Mike and Ruth Partin - Concerned Citizens of Sycamore Valley. Monroe County, Ohio
Gwen Fisher - Concerned Citizens Ohio. Portage County, Ohio
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Cc: Interagency Working Group on Environmental Justice, Washington D.C.
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