

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

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In Re:	:	
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	:	Permit Appeal
Penneco Environmental Solutions, LLC	:	UIC 24-02
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UIC Permit No. PAS2D702BALL	:	
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SUR-REPLY TO PETITIONERS' OMNIBUS REPLY

TABLE OF CONTENTS

TABLE OF AUTHORITIES	2
STATEMENT OF COMPLIANCE WITH WORD LIMITATION	2
SUMMARY	3
REPLIES TO NEW ARGUMENTS PRESENTED BY PETITIONERS’ REPLY	3

TABLE OF AUTHORITIES

EAB CASES

<i>In re Arecibo & Aguadilla Regional Wastewater Treatment Plants</i> , 12 E.A.D. 97 (EAB 2005) ...	4, 6
<i>In re BP Cherry Point</i> , 12 E.A.D. 209 (EAB 2005)	4
<i>In re Carlota Copper Co.</i> , 11 E.A.D. 692 (EAB 2004).....	4
<i>In re City of Keene</i> 18 E.A.D. 720 (EAB 2022)	4, 6
<i>In re Muskegon Dev. Co.</i> , 18 E.A.D. 88 (EAB 2020)	5

FEDERAL REGULATIONS

40 C.F.R. 124.19	4, 6
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EXECUTIVE ORDERS

Executive Order 12898 “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations”, 59 Fed. Reg. 7629 (Feb. 16, 1994)	5
Executive Order 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, 86 FR 7009 (Jan. 25, 2021)	3
Executive Order 13990, Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis, 86 FR 7037 (Jan. 25, 2021)	3, 4
Executive Order 14008, Tackling the Climate Crisis at Home and Abroad, 86 FR 7619 (Feb. 1, 2021).....	3, 4

STATEMENT OF COMPLIANCE WITH WORD LIMITATION

This Sur-Reply does not exceed the 7,000-word limit for non-response briefs, specified in 40 C.F.R. § 124.19(d)(3).

SUMMARY

On May 22, 2024, the Petitioners in this appeal filed an Omnibus Reply to Region 3's and Penneco Environmental Solutions' Responses. The Petitioners' Reply introduces two new arguments that they did not make in their Petition. The Region responds as follows and requests the Board not review these arguments that Petitioners now raise for the first time. The Petitioners base their two arguments on Executive Orders 13990 and 14008, and asserted defects in the notice for the draft permit.

REPLIES TO NEW ARGUMENTS PRESENTED BY PETITIONERS' REPLY

First, in their Reply, the Petitioners, to support their argument that the Region failed to account for Environmental Justice ("EJ") factors, rely on two Executive Orders: Executive Order 13990, Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis, 86 FR 7037 (Jan. 25, 2021); and Executive Order 14008, Tackling the Climate Crisis at Home and Abroad, 86 FR 7619 (Feb. 1, 2021). Reply at 9–12.¹ Both Executive Orders set policy priorities that apply to all Federal Government Agencies and assign specific responsibilities to certain agencies.

The Petitioners contend that EPA did not comply with the Executive Orders when it issued the permit. However, no commenter, including the Petitioners, referred to or questioned the effect that the Executive Orders' policy priorities have on EPA's work and operations. Exhs.

¹ To support their argument, the Petition quotes from a third Executive Order that the Reply does not acknowledge: EO 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, 86 FR 7009 (Jan. 25, 2021). Reply at 10.

6, 9 and 10. In addition, no commentor remarked on the specific duties the Orders assigned to EPA with respect to the Penneco UIC permit. *Id.* Further, the Petition did not refer to the Executive Orders.

The permit appeal regulations require that a petitioner demonstrate that any issue or argument raised on appeal was previously raised during the comment period. 40 C.F.R. 124.19; *In re City of Keene*, 18 E.A.D. 720, 754 (EAB 2022). This requirement ensures that a Region issuing a permit has an opportunity to address any potential problems. *In re Arecibo & Aguadilla Regional Wastewater Treatment Plants*, 12 E.A.D. 97, 116–17 (EAB 2005).

Preservation of an issue for the Board’s review is a matter of the Board’s jurisdiction. 40 C.F.R. § 124.19 (a)(4)(ii); *In re BP Cherry Point*, 12 E.A.D. 209, 218–220 (EAB 2005). Generalized questions and concerns during the comment period are not sufficient to preserve a more specific challenge during appeal. *In re Carlota Copper Co.*, 11 E.A.D. 692, 722–23 (EAB 2004). Therefore, in accordance with Board regulations and precedent the Petitioners plainly should be barred from raising new issues regarding EPA’s consideration of EJ under these Executive Orders.

The Region notes that both Executive Orders contain the identical disclaimer that does not allow for, outside of the Federal Government, any party seeking to use the Orders’ provisions to enforce any rights or benefits. The disclaimers read: “This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.” EO 13990, Sec. 8(c), 86 FR at 7043; EO 14008, Sec.

301(c), 86 FR at 7632.² As a result, the Executives Orders do not create a basis for rescinding the permit. Notwithstanding the disclaimer, EPA strives to integrate all relevant EO policy directives, as appropriate, and consistent with applicable law.

Second, the Region seeks to rebut allegations made in the Reply about the administrative record. Specifically, the Petitioners incorrectly represent the availability of the administrative record for the Permit for public review. In the Reply, the Petitioners allege that “[T]he Region did not make the administrative materials publicly available before or after the hearing.” Reply at 14. This statement is not correct.

The Region issued the public notice for the draft permit by sending it out in an email and by having it printed in a local newspaper. Exh. 3³, Draft Permit, Statement of Basis, and Public Notice for Injection Well Sedat #4A; Exh. 5, Public Notice in *Pittsburgh Post-Gazette* (May 26, 2022). The notice stated that the administrative record for the draft permit was available for review by the public. Statement of Basis at 5 and Pittsburgh Post-Gazette at 1. The notice also informed the public that the draft permit, the statement of basis for the draft permit, and permit application materials were posted on EPA’s website. Statement of Basis at 5 and

² Executive Order 12898 has a similar disclaimer. Executive Order 12898, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,” Sec. 6-608, 59 Fed. Reg. 7629, 7632–33 (Feb. 16, 1994). While, EO 12898 gives permitting authorities discretion to determine how best to implement its mandate within the confines of existing law, the Executive Order does not dictate any particular outcome in a permit decision. *In re Muskegon Dev. Co.*, 18 E.A.D. 88, 91–92 (EAB 2020).

³ Except for Exhibit 4, this Sur-Reply references the exhibits the Region filed with its Response for this appeal. Today the Region has filed a Motion for Leave to File a Corrected Exhibit, a corrected version of Exhibit 4. The initial exhibit the Region filed with the Response was incomplete.

Pittsburgh Post-Gazette at 1. The Statement of Basis had a link to EPA's website where EPA had information about the draft permit. Statement of Basis at 5.

Exhibit 4, Public Notice on EPA Public Website, is a screen shot of the EPA website that had links to the draft permit, the statement of basis for the draft permit, and permit application materials. The website also had a link to the index to the other documents in the administrative record that Region relied upon to issue the draft permit and that were available from the Region. *Id.*

As was the case with the Executive Orders relating to Environmental Justice discussed *supra*, no commenter, including the Petitioners, questioned the availability of the administrative record or means of inspecting during the public comment period. Exhs. 6, 9 and 10. Further, the Petitioners did not raise this issue in their Petition.

The permit appeal regulations require that a petitioner demonstrate that any issue or argument raised on appeal was previously raised during the comment period. 40 C.F.R. 124.19; *In re Keene*, 18 E.A.D. at 754 (EAB 2022). This requirement ensures that a Region issuing a permit has an opportunity to address any potential problems. *In re Arecibo & Aguadilla*, 12 E.A.D. at 116–17. Because the issue was not raised previously, Petitioners may not raise it now at this late stage.

Respectfully submitted,
/s/ Philip Yeany

*(signed per Revised EAB Order re: Electronic Filing
in non-Part 22 Proceedings, 8/12/13)*

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