

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

In Re:	:
	:
	:
Penneco Environmental Solutions, LLC	: Permit Appeal
	: UIC 24-02
	:
	:
UIC Permit No. PAS2D702BALL	:
	:
	:
	:

MOTION REQUESTING OFFICAL NOTICE BY THE BOARD

The Region requests that the Board take official notice of Agency documents cited in the companion Response to Petition (“Response”) that the Region also filed today. The Region initially cites all the documents in the Response’s argument number 7. Argument number 7 is the Region’s substantive response concerning the interpretation of 40 C.F.R. § 144.6(b)(1) (plus § 146.5(b)(1)) and the disposal in Class II wells of waste fluids from both unconventional and conventional oil and natural gas formations (Petitioners’ Issue A).

The Region first argues in the Response that, as a jurisdictional matter, the Board should reject the Petitioners’ Issue A because no one directly or indirectly raised this issue during the public comment period. In case the Board decides nonetheless to consider the Petitioners’ substantive argument concerning the meaning of the phrase “conventional oil and natural gas production,” the Region’s argument number 7 responds substantively to Petitioners’ argument.

Because no one directly or indirectly commented on the meaning of 40 C.F.R. § 144.6(b)(1) and the use of the term “conventional oil and natural gas production” during the public comment period, the Response to Comments did not address the issue as part of the

final permit issuance. As a result, the documents for which the Region requests official notice are not part of the administrative record. However, the documents contain relevant non-record information.

In prior cases, the Board has stated that, depending upon the circumstances, it will take “official notice” of certain relevant non-record information, generally public documents such as statutes, regulations, judicial proceedings, public records, and Agency documents. *In re Russell City Energy Center*, 15 E.A.D. 1, 36 (EAB 2010); *citing among other cases, City of Denison*, 4 E.A.D.414, 419 n.8 (taking official notice of a regional order regarding the “line of succession” in a region); *In re Hawaiian Commercial & Sugar Co.*, 4 E.A.D. 95, 102 n.13 (EAB 1992) (taking official notice of a basic Agency reference document). *Cf. Dominion II*, 13 E.A.D. 407, 418 (EAB 2007) (Board takes official notice of document submitted by Petitioners in response to documents cited for first time by the Region in the Region’s response to comments.).

Because the Region was not presented with the issue of the meaning of “conventional oil and natural gas production” in the rule until the Petitioners’ appeal, the Region was not afforded the opportunity to respond until now to the issue. In addition, the documents the Petitioners reference to support their argument were not presented to the Region. As matter of parity among the parties, EPA should be allowed to reference documents that were not part of the administrative record for the permit but are needed now to cogently respond to the Petition. Therefore, the Region requests that the Board grant this motion because each document is a public document that contains relevant non-record information.

The Region asks the Board to take official notice of five public documents that EPA has issued. The following list names each document, refers to the location where the document is cited in the Response, refers to the location where the document is publicly available, and provides a reason why the document is relevant to the Region's argument. Four of the documents are available on EPA's public web sites and the other was published in the Federal Register:

1. Guidance for State Submissions under Section 1425 of the Safe Drinking Water Act, Response at 31, available at <https://www.epa.gov/sites/default/files/2020-02/documents/guidanceforstatesubmissionsundersection1425ofthesdwa.pdf> (last accessed on April 9, 2024). The Region's argument relies in part on an interpretation of Section 1425 of the Safe Drinking Water Act, 42 U.S.C. § 300h-4. This document provides information about the meaning of the Section 1425 as it relates to the Act's regulation of the disposal of oil and natural gas production wastewater.
2. Summary of Input on Oil and Gas Extraction Wastewater Management Practices Under the Clean Water Act, initially cited in the Response at 33, available at <https://www.epa.gov/sites/default/files/2020-05/documents/oil-gas-final-report-2020.pdf> (last accessed on April 9, 2024). Part of the document discusses the similarities between waste fluids from conventional and unconventional formations. This discussion supports the Region's arguments that Class II wells are the correct UIC well class for disposal of fluids from both wastewater sources.

3. Classification of Wells Used to Inject Air scrubber Waste or Water Softener

Regeneration Brine Associated with Oil Field Operations, Response at 35, available at

[https://www.epa.gov/sites/default/files/2020-](https://www.epa.gov/sites/default/files/2020-02/documents/cook_memo_on_well_classification_of_oil_field_waste_air_scrubber_waste.pdf)

[02/documents/cook memo on well classification of oil field waste air scrubber w](https://www.epa.gov/sites/default/files/2020-02/documents/cook_memo_on_well_classification_of_oil_field_waste_air_scrubber_waste.pdf)

[aste.pdf](https://www.epa.gov/sites/default/files/2020-02/documents/cook_memo_on_well_classification_of_oil_field_waste_air_scrubber_waste.pdf) (last accessed on April 9, 2024). This document provides evidence that EPA has

consistently taken the position that Class II wells are the correct UIC well class for

disposal of waste fluids resulting from oil and natural gas production.

4. Revisions to the Underground Injection Control Regulations for Class V Injection Wells,

Response at 36, available at 64 FR 68545 (Dec. 7, 1999). This document provides

evidence that EPA has consistently taken the position that Class II wells are the correct

UIC well class for disposal of waste fluids resulting from oil and natural gas production.

5. Statement of Basis and Purpose – Underground Injection Control Regulations; Response

at 40, available at

<https://nepis.epa.gov/Exe/ZyPDF.cgi/P100ZM69.PDF?Dockkey=P100ZM69.PDF> (last

accessed on May 3, 2024). This document provides evidence that the Safe Drinking

Water Act's requirement of essential need to justify regulations of the disposal of waste

fluids resulting from oil and natural gas production supports EPA's position that Class II

wells is the correct UIC well class for these waste fluids' disposal.

I have contacted counsel for both the Permittee and the Petitioners and neither oppose this motion.

Respectfully submitted,

/s/ Philip Yeany

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

Philip Yeany

Senior Assistant Regional Counsel
U.S. Environmental Protection Agency, Region III
1600 John F. Kennedy Boulevard
Philadelphia, Pennsylvania 19103
Phone: (215) 814-2495
Email: Yeany.Philip@epa.gov

Of Counsel:
Katie Spidalieri
Water Law Office
Office of General Counsel
U.S. Environmental Protection Agency
William Jefferson Clinton North Building
Office 7308B
202-564-4138
Email: Spidalieri.Katie@epa.gov