IN RE PENNECO ENVIRONMENTAL SOLUTIONS, LLC

UIC Appeal Nos. 23-01 & 24-02

ORDER DENYING REVIEW

Decided November 25, 2024

Syllabus

This case involves two nearly identical petitions filed with the Environmental Appeals Board for review of a Class II-D Underground Injection Control ("UIC") permit decision issued by U.S. Environmental Protection Agency Region 3. The permit authorizes Penneco Environmental Solutions, LLC, to convert an existing gas production well into a commercial injection well and subsequently operate it for disposal of fluids from oil and gas production wells. Protect PT and Three Rivers Waterkeeper filed one petition, and Dr. Patricia B. Carr and Mr. Matthew Kelso filed the other petition. Both petitions raise arguments based on the Clean Water Act ("CWA"); the Safe Drinking Water Act ("SDWA"); Article I, Section 27 of the Pennsylvania State Constitution (commonly referred to as Pennsylvania's Environmental Rights Amendment ("ERA")); Pennsylvania's Clean Streams Law; and environmental justice ("EJ").

Held: Petitioners have not demonstrated that review is warranted on any of the grounds presented. The Board denies the petitions for review.

A. The Board denies review of Petitioners' CWA claims. In appeals of UIC permitting decisions, the Board has consistently denied claims arising under laws outside of the SDWA UIC permitting requirements. Petitioners' CWA claims focus on the permit's alleged impact to surface waters, arguing that a CWA National Pollutant Discharge Elimination System permit is required to discharge pollutants from a point source into the waters of the United States and that the injection well activities threaten waterways within Plum Borough and Pennsylvania. Petitioners fail to link, either by citation or legal support, their CWA claims to the SDWA UIC permitting program. Petitioners' CWA arguments are not relevant in a proceeding to determine the validity of a UIC permit decision, and the Board denies review of the Petitioners' CWA claims as being outside the scope of the UIC program.

B. The Board denies review of Petitioners' state law claims. Petitioners argue that the issuance of the UIC permit violates Pennsylvania's ERA and the Pennsylvania

Clean Streams Law in a multitude of ways, including claims that the Region violated their fiduciary duties under the ERA and that the injection activities are prejudicial to the public interest in violation of the Clean Streams Law. The Board has consistently denied review of state law issues that are outside the scope of the federal UIC program. Accordingly, the Board denies review of Petitioners' claims arising under the Pennsylvania ERA and Clean Streams Law, as they are outside the scope of the SDWA UIC permitting program.

C. The Board denies review of Petitioners' EJ claims. Petitioners challenge the Region's EJ analysis. The Region properly conducted the EJScreen analysis, applied the appropriate thresholds, and found that further evaluation of the site was not necessary. The Region also took additional steps within its existing legal authority with respect to public participation and the stringency of the permit conditions to address any EJ concerns for all communities surrounding the well. The Board finds that the record supports the Region's conclusion that no further EJ analysis was needed. The Board also concludes that Petitioners failed to confront the Region's response to comments on this issue. Thus, Petitioners have not demonstrated clear error or abuse of discretion.

D. The Board denies review of the remaining claims. Petitioners raise several arguments that were not preserved for review. Specifically, Petitioners claim (1) an amendment in the Energy Policy Act of 2005 that exempts certain oil and gas activity from regulation under the SDWA, often referred to as the "Halliburton Loophole" or "Halliburton Exclusion," violates the ERA and the "EPA's Environmental Justice Policy," (2) the UIC Class II regulatory definition precludes the injection of fracking fluids into Class II wells, (3) the financial assurance required in the permits is insufficient and violates the Pennsylvania ERA, among other things, and (4) all of the issues raised in the petitions have denied Petitioners Equal Protection in violation of the U.S. Constitution. The Board denies review of these arguments as Petitioners failed to preserve them.

Before Environmental Appeals Judges Aaron P. Avila, Wendy L. Blake, and Mary Kay Lynch.

Opinion of the Board by Judge Avila:

I. *STATEMENT OF THE CASE*

This case involves two nearly identical petitions filed with the Environmental Appeals Board for review of a Class II-D Underground Injection Control ("UIC") permit decision issued by U.S. Environmental Protection Agency Region 3. The permit authorizes Penneco Environmental Solutions, LLC, to convert an existing gas production well into a commercial injection well and

subsequently operate it for disposal of fluids from oil and gas production wells. The UIC well, identified as Sedat #4A, is located in Plum Borough, Pennsylvania.

Protect PT and Three Rivers Waterkeeper filed the first petition for review and shortly thereafter Penneco filed a motion to dismiss, arguing that the petition was untimely. The Board denied the motion to dismiss, finding that the thirty-day time period for filing an appeal of the final permit decision was never triggered because the Region did not provide proper notice of the final permit decision consistent with the requirements of 40 C.F.R. § 124.15(a). *In re Penneco Env't Sols., LLC*, 19 E.A.D. 13, 20 (EAB 2024). Following the Board's order, the Region provided notice of the final permit decision consistent with regulatory requirements. A second petition was then filed by Dr. Patricia B. Carr and Mr. Matthew Kelso for review of the same Class-II D UIC permit.

Both petitions raise arguments based on the Clean Water Act ("CWA"); the Safe Drinking Water Act ("SDWA"); Article I, Section 27 of the Pennsylvania State Constitution (commonly referred to as Pennsylvania's Environmental Rights Amendment ("ERA")); Pennsylvania's Clean Streams Law; and environmental justice ("EJ"). Dr. Patricia B. Carr and Mr. Matthew Kelso's petition contains the same arguments as Protect PT and Three Rivers Waterkeeper's petition and, for the most part, is word-for-word identical to the first-filed petition, with the exception of an expansion on the environmental justice claim and references to the Equal Protection Clause.[1]

The Board resolves both petitions in this Order and denies review of both petitions.

II. *LEGAL FRAMEWORK AND FACTUAL AND PROCEDURAL HISTORY*

A. *Underground Injection Control Program*

The SDWA requires EPA to promulgate regulations for state UIC programs to protect underground sources of drinking water. SDWA § 1421, 42 U.S.C. § 300h. EPA has promulgated such regulations, including minimum requirements for UIC permits. *See* 40 C.F.R. pts. 144-148. EPA administers the UIC program in states such as Pennsylvania that are not authorized to administer their own UIC program. *See id*. §§ 144.1(e), 147.1951; *see also* U.S. EPA Region 3 Response to

[1] Where the second-filed petition, UIC Appeal No. 24-02, differs from the first-filed petition, UIC Appeal No. 23-01, the discussion below includes citations to the appropriate petition.

Petition for Review 23-01, at 8-9 (Apr. 12, 2024) ("Reg.'s Resp. Br. 23-01") ("In states such as Pennsylvania without an approved UIC program, EPA is the permitting authority, directly implementing the UIC regulations and issuing permits."); U.S. EPA Region 3 Response to Petition for Review 24-02, at 8-9 (May 9, 2024) ("Reg.'s Resp. Br. 24-02") (same).

The UIC program focuses on the protection of underground water that "supplies or can reasonably be expected to supply any public water system" from "any contaminant" that may be present as a result of underground injection activities. SDWA § 1421(d)(2), 42 U.S.C. § 300h(d)(2); *see also* 40 C.F.R. § 144.12(a). The purpose of the UIC regulations is to prevent the movement of fluids containing contaminants into underground sources of drinking water if the presence of those contaminants may cause a violation of a primary drinking water regulation or may otherwise adversely affect human health. *See* 40 C.F.R. § 144.12(a). "[A]ll injection activities including construction of an injection well are prohibited until the owner or operator is authorized by permit." *Id*. § 144.31(a).

Injection wells fall into six classes. *Id*. §§ 144.6, 146.5. Class II disposal wells, which are at issue in this case, include wells used to inject fluids "brought to the surface in connection with natural gas storage operations, or conventional oil or natural gas production * * * unless those waters are classified as a hazardous waste at the time of injection." *Id*. § 144.6(b)(1).

B. *Factual and Procedural History*

Penneco applied for a Class II UIC permit from Region 3 to use the Sedat #4A well, which has been a gas[2] production well, as an injection well.[3] Penneco, *Penneco Env't. Sols., LLC, UIC Application Sedat #4A* (Aug. 5, 2021) (Petition for Review by Protect PT and Three Rivers Waterkeeper (Oct. 26, 2023) ("Pet. 23-01") attach. 9; Petition for Review by Dr. Patricia Carr and Mr. Matthew Kelso (Apr. 8, 2024) ("Pet. 24-02") attachs. 9-10).

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[2] For purposes of this decision, "gas" refers to natural gas. *See* U.S. Energy Info. Admin., https://www.eia.gov/tools/glossary/index.php?id=G (last visited Nov. 25, 2024) (defining "Gas" as "[a] non-solid, non-liquid combustible energy source that includes natural gas, coke-oven gas, blast-furnace gas, and refinery gas").

[3] The Sedat #4A well is located about 800 feet from another injection well that Penneco currently owns and operates, referred to as the Sedat #3A well, for which the EPA issued a final permit on March 7, 2018. Resp. to Cmts. at 2 (Prelim. Note).

After reviewing Penneco's application for Sedat #4A, the Region issued a public notice on May 26, 2022, requesting comments on a draft UIC permit for the well and offering the opportunity for a public hearing on the permit. U.S. EPA Region 3, *Public Notice: Underground Injection Control (UIC) Program Notice of Draft Permit Penneco Env't Sols., PAS2D702BALL* (May 26, 2022) (Reg.'s Resp. Br. 23-01 attach. 2; Reg.'s Resp. Br. 24-02 attach. 4) (A.R. 67). In response to requests for a public hearing, the Region held a virtual hearing on the draft permit on June 28, 2022. Reg.'s Resp. Br. 23-01, at 13; Reg.'s Resp. Br. 24-02, at 12. Commenters claimed that the virtual nature of the hearing discouraged some interested parties from providing comments on the draft permit. U.S. EPA Region 3, *Responsiveness Summary to Public Comments for the Issuance of an UIC Permit for Penneco Env't. Sols., LLC* 39 (Cmt. #24) (Reg.'s Resp. Br. 23-01 attach. 9; Reg.'s Resp. Br. 24-02 attach. 11) (A.R. 63) ("Resp. to Cmts."); *see also* Pet. 23-01, at 4; Pet. 24-02, at 5. In response to the public's requests, the Region held an in-person public hearing on August 30, 2022. Resp. to Cmts. at 40 (Cmt. #24). Several commenters also objected to the length of time allowed for the submission of public comments, and the Region responded by extending the public comment period on the draft permit until September 7, 2022, making the entire comment period 104 days. *See id*. After reviewing the record, including the public comments, the Region issued a final permit to Penneco on September 21, 2023. U.S. EPA Region 3, *Underground Injection Control Permit Number PAS2D702BALL Authorization to Operate a Class II-D Injection Well* 1 (Sept. 19, 2023) (Pet. 23-01 attach. 1; Pet. 24-02 attach. 1) (A.R. 73) ("Permit").

The permit authorizes Penneco to construct and operate a Class II-D commercial disposal injection well, Sedat #4A, for the purpose of injecting fluids produced solely in association with oil and gas production from wells owned by Penneco and other oil and natural gas production wells in the area. Permit at 1. Following conversion of the Sedat #4A well to an injection well and prior to initiating injection operations, the permit requires Penneco to demonstrate the mechanical integrity of the well consistent with the requirements of 40 C.F.R. § 146.8. Permit pt. II.D.2.b, at 8; *see also* Resp. to Cmts. at 15 (Cmt. #3). Penneco cannot commence injection until such time as it receives notice from the Director of the EPA Region 3 Water Division that its demonstration is satisfactory and in accordance with permit terms. Permit pts. II.D.2.b, III.A.4, at 8, 13; *see also* Resp. to Cmts. at 13-17 (Cmt. #3). Following the initial mechanical integrity demonstration, the permit requires Penneco to demonstrate mechanical integrity periodically and to provide continuous monitoring of surface injection pressure, annular pressure, and cumulative injection volume. Permit pts. II.C.7, E.1, at 8, 12; *see also* Resp. to Cmts. at 13-17 (Cmt. #3). The permit further requires the injection well to be equipped with automatic shut-off devices in the event of a mechanical

integrity failure. Permit pt. II.C.2, at 7; *see also* Resp. to Cmts. at 15, 33 (Cmts. #3, 17).

Protect PT and Three Rivers Waterkeeper filed an appeal of the Region's permitting decision with the Board. Pet. 23-01. Penneco filed a motion to dismiss that petition as untimely filed. Penneco Motion to Dismiss (Nov. 6, 2023) ("Penneco Mot. to Dismiss"). The Board denied Penneco's motion, concluding that the Region failed to serve Petitioners with the required notice as specified in 40 C.F.R. § 124.15(a), and ordered the Region to provide notice of the issuance of the final permit in accordance with the regulatory requirements. *Penneco Env't. Sols.*, 19 E.A.D. at 18-20, 22. The Region complied and provided notice of Penneco's final permit on March 7, 2024, starting the thirty-day time period for filing an appeal. *See* Email from U.S. EPA Region 3 (Mar. 7, 2024, 07:54 am ET) (titled "Notice of Issuance of Federal Underground Injection Control Program Permit to Penneco Env't Sols. (UIC Permit No. PAS2D702BALL) and Appeals Procedure") (Reg.'s Resp. Br. 23-01 attach. 10). During that timeframe, Dr. Carr and Mr. Kelso filed a petition for review of the Region's permitting decision with the Board. Pet. 24-02.[4]

III. *PRINCIPLES GOVERNING BOARD REVIEW*

Section 124.19 of Title 40 of the Code of Federal Regulations governs Board review of a UIC permit. "The Board exercises its authority to review permit appeals 'only sparingly,' adhering to the agency's view that most permit conditions should be determined at the permit issuer level." *In re Deseret Generation and Transmission Coop. Bonanza Power Plant*, 19 E.A.D. 67, 76 (EAB 2024) (quoting Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,412 (May 19, 1980)).

In considering any petition filed under § 124.19(a), the Board first considers whether the petitioner has met threshold procedural requirements, including, among other things, whether issues that were "reasonably ascertainable" during the public comment period have been preserved for Board review. *See* 40 C.F.R. §§ 124.13, .19(a)(2)-(4); *In re Florence Copper Inc.*, 17 E.A.D. 406, 409 (EAB 2017). For example, a petitioner must demonstrate that any issues and arguments

[4] The Board observes that it is unclear how Dr. Carr satisfies the regulatory requirements to file a petition for review. *See* 40 C.F.R. § 124.19 (stating that "[a]ny person who filed comments of the draft permit or participated in a public hearing on the draft permit may file a petition for review"). However, given that Mr. Kelso's ability to file the petition for review is not disputed, the Board need not explore this issue further.

it raises on appeal were raised with "a reasonable degree of specificity and clarity" during the public comment period or public hearing. *In re Westborough*, 10 E.A.D. 297, 304 (EAB 2002); *see also In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 230 (EAB 2000) (holding issue was not preserved when it was not presented in comments "with sufficient clarity to enable a meaningful response"). The Board typically denies or dismisses the petition for review if a petitioner fails to meet threshold requirements. *In re Muskegon Dev. Co*., 17 E.A.D. 740, 742 (EAB 2019). If the petitioner meets these threshold requirements, the Board will consider the substance of the petitioner's arguments. *Deseret*, 19 E.A.D. at 77.

Under 40 C.F.R. § 124.19, the petitioner has the burden of demonstrating that review is warranted. The Board will ordinarily deny a petition for review unless the petitioner demonstrates that the permitting decision is: (1) based on a clearly erroneous finding of fact or conclusion of law, or (2) involves an exercise of discretion that warrants review. 40 C.F.R. § 124.19(a)(4)(i); *e.g.*, *In re Jordan Dev. Co*., *LLC*, 18 E.A.D. 1, 4-5 (EAB 2019). Where a petitioner raises an issue that the permitting authority addressed in the response to comments document, petitioner must provide a citation to the comment and response and explain why the response was clearly erroneous or otherwise warrants review. 40 C.F.R. § 124.19(a)(4)(ii).

IV. *ANALYSIS*

According to Petitioners, the Region's issuance of the Class II-D UIC permit to Penneco violates the CWA, the SDWA, Pennsylvania's ERA, Pennsylvania's Clean Streams Law, "EPA's Environmental Justice Policy," and the Equal Protection Clause. *See generally* Pet. 23-01; Pet. 24-02. The Region and Penneco disagree. For the reasons set forth below, the Board denies review as to all of Petitioners' claims.

A. *Petitioners' Arguments Related to the CWA Are Beyond the Scope of the UIC Program*

Petitioners raise various claims under the CWA, including that: (1) a National Pollutant Discharge Elimination System ("NPDES") permit is required for the Sedat #4A well under *County of Maui v. Hawaii Wildlife Fund*, 590 U.S. 165 (2020), and (2) the UIC permit activities would endanger waterways in violation of the CWA. *See* Pet. 23-01, at 40-44; Pet. 24-02, at 42-45. The Region and Penneco argue that Petitioners' CWA claims are not properly before the Board in this appeal because they pertain to matters outside of the SDWA UIC program. *See* Reg.'s Resp. Br. 23-01, at 24-25, 27; Reg.'s Resp. Br. 24-02, at 21-22; Permittee's Response to Petition for Review at 13-14, 19-20 (Apr. 15, 2024)

("Penneco's Resp. Br. 23-01"); Permittee's Response to Petition for Review, at 21-22 (May 8, 2024) ("Penneco's Resp. Br. 24-02"). The Board agrees.

"[T]he Board 'has made clear that its authority to review UIC permit decisions extends to the boundaries of the UIC permitting program itself, with its SDWA-directed focus on the protection of [underground sources of drinking water] and no farther.'" *Jordan Dev. Co.*, 18 E.A.D. at 26 (quoting *In re Env't Disposal Sys.*, 12 E.A.D. 254, 266 (EAB 2005)). As the Board explained in *In re NE Hub Partners, LP*, 7 E.A.D. 561 (EAB 1998):

> The Agency's UIC regulations are oriented exclusively toward the statutory objective of protecting drinking water sources. The stated purpose of the UIC regulations is to prevent movement of fluids containing contaminants into [underground sources of drinking water] if the presence of those contaminants might cause a violation of a primary drinking water regulation or otherwise adversely affect human health. 40 C.F.R. § 144.12(a). The UIC regulations also require that certain other federal laws must be adhered to in the UIC permit process. 40 C.F.R. § 144.4. Thus, the SDWA * * * and the UIC regulations * * * establish the *only* criteria that EPA may use in deciding whether to grant or deny an application for a UIC permit, and in establishing the conditions under which deep well injection is authorized.

7 E.A.D. at 567 (internal quotations and case citations omitted). In appeals of UIC permitting decisions, the Board has consistently denied claims arising under laws outside of the SDWA UIC permitting requirements, including other federal statutes. *See, e.g.*, *Env't Disposal*, 12 E.A.D. at 279 (declining to review a RCRA claim that "does not turn on an interpretation or application of the SDWA or UIC regulations"); *In re Am. Soda, LLP*, 9 E.A.D. 280, 289-90 (EAB 2000) (concluding that the Board lacked jurisdiction to review alleged deficiencies in another agency's National Environmental Policy Act process).

The Petitioners' CWA claims focus on the permit's alleged impact to surface waters, arguing that an NPDES permit is required "to discharge pollutants from a point source into the surface waters of the United States" and that the injection well activities threaten waterways within Plum Borough and Pennsylvania as a whole. Pet. 23-01, at 40-42; Pet. 24-02, at 42-44. However, Petitioners do not explain, let alone demonstrate, how these arguments implicate the SDWA UIC permitting program, particularly with respect to the program's narrow focus on

protection of underground sources of drinking water ("USDWs").[5] Instead, Petitioners attempt to shoehorn their CWA claims into the realm of the SDWA UIC program by discussing the two in tandem, stating that "the risk posed [by the UIC permit] to both ground and surface water quality raises concerns under both the CWA and the SDWA" and that issuing a permit "without a full understanding of the consequences of [groundwater] migration" violates the CWA and SDWA by "endanger[ing] water sources and supplies." Pet. 23-01, at 40, 43-44; Pet. 24-02, at 42, 45. These general statements fail to link, either by citation or legal support, their CWA claims to the SDWA UIC program. Petitioners fail to identify any part of the SDWA UIC permitting program or the CWA NPDES permitting program that requires a permittee to secure an NPDES permit in order to receive a Class II UIC permit.[6] Petitioners' CWA arguments are, therefore, not relevant in a proceeding to determine the validity of a UIC permit decision. Accordingly, the Board sees no reason to deviate from the "strict line of demarcation that historically has been observed between UIC and non-UIC * * * claims" and denies review of Petitioners' CWA claims as outside the scope of the UIC program.[7] *See Env't Disposal*, 12 E.A.D. at 272 n.13.

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[5] Petitioners have not made with any specificity an argument that the issuance of this UIC permit may impact surface waters that in turn may affect USDWs. *See In re MCN Oil and Gas Co.*, UIC Appeal No. 02-03, at 31 (EAB Sept. 5, 2002) (Order Denying Review). The Region addressed potential fluid migration to both USDWs and surface waters in the response to comments, explaining that "[t]he upper and lower confining zones [for the injection well] will prevent the injected fluid from reaching any USDW as well as any surface waters in the area such as the Allegheny River and Plum Creek * * * most likely it will be many years, if ever, before the wastewater would reach surface waters." Resp. to Cmts. at 34-35 (Cmt. #18); *see id.* at 4-13 (Cmt. #2). Petitioners did not address the Region's response, as required by 40 C.F.R. § 124.19(a)(4)(ii).

[6] The Board notes that the Pennsylvania Department of Environmental Protection ("DEP") is authorized to issue NPDES permits. National Pollutant Discharge Elimination System Memorandum of Agreement Between the Commonwealth of Pennsylvania and The United States Environmental Protection Agency Region III (revised May 7, 1991), https://www.epa.gov/sites/default/files/2013-09/documents/pa-moa-npdes.pdf (last visited Nov. 25, 2024). The decision on whether to issue an NPDES permit is one made by the Pennsylvania DEP. *See, e.g.*, *In re Coastal Energy Corp.*, NPDES Appeal No. 17-04, at 3 (EAB Sept. 12, 2017) (Order Dismissing Petition for Lack of Jurisdiction).

[7] The Board observes that Petitioners' *Maui* argument rests in part on an apparent misunderstanding of the Region's response to comments. In their petitions, the Petitioners

B. *Petitioners' Arguments Related to State Law Are Beyond the Scope of the UIC Program*

Petitioners argue that the issuance of the UIC permit violates Pennsylvania's ERA and the Pennsylvania Clean Streams Law in a multitude of ways, including claims that the Region failed to fulfill its alleged fiduciary duties under the ERA and that the injection activities are prejudicial to the public interest contrary to the Clean Streams Law. Pet. 23-01, at 13-39, 44-46; Pet. 24-02, at 15-42, 45-47. The Region and Penneco argue that state law issues are outside the Board's scope of review for UIC permit appeals. *See* Reg.'s Resp. Br. 23-01, at 21-23; Reg.'s Resp. Br. 24-02, at 19-20; Penneco's Resp. Br. 23-01, at 13-16; Penneco's Resp. Br. 24-02, at 17-19. The Board agrees that these state law issues are not properly before the Board.

"[T]he permit issuer's authority to issue, and the Board's authority to review, UIC permits extends to the boundaries of the UIC permitting process itself." *In re Archer Daniels Midland Co.*, 17 E.A.D. 380, 405 (EAB 2017). The Board is not the proper forum for disputes that "are governed by legal precepts other than those contained in the SDWA and UIC regulations," or that "flow from decisions made at the state or local levels," and "not from requirements of the SDWA UIC program." *Env't Disposal*, 12 E.A.D. at 267, 295; *see In re Federated Oil & Gas*, 6 E.A.D. 722, 725 (EAB 1997). The Board has consistently denied review of state law issues that are outside the scope of the federal UIC program. *See, e.g.*, *In re Windfall Oil and Gas, Inc.*, 18 E.A.D. 411, 428 (EAB 2021) (declining to review issues regulated by Pennsylvania law); *Env't Disposal*, 12 E.A.D. at 279, 295 (declining to review several state law claims); *In re Puna Geothermal Venture*, 9 E.A.D. 243, 278 (EAB 2000) (declining to review "zoning conflict" that needed to be addressed at the state or local level); *In re Envotech, L.P.*, 6 E.A.D. 260, 275 (EAB 1996) (holding that "the Board does not have the

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summarize the *Maui* decision and argue that the Region's reading of *Maui* was too narrow and "[t]he fact that contaminants must flow underground before reaching navigable surface waters should not exempt the Sedat 4A Injection Well from the CWA's requirements for other point sources." Pet. 23-01, at 40-41; Pet. 24-02, at 42-43; *see also* Pet. 23-01, at 44; Pet. 24-02, at 45. However, the Region's response to comments did not state anything contrary to this position and, in fact, the Region acknowledged that the *Maui* Court found that an NPDES permit may be required for discharges of pollutants through groundwater that are found to be a "functional equivalent" to a direct discharge into waters of the United States. Resp. to Cmts. at 34 (Cmt. #18). The Region also explained that those are not the facts here, to which the Petitioners provided no response. *Id.* at 34-35.

authority to consider issues raised by petitioners concerning matters that are exclusively within the State's power to regulate"); *see also In re Sammy-Marr, LLC*, 17 E.A.D. 88, 97-98 (EAB 2016) (dismissing arguments pertaining to local matters, including funding of local emergency services and property value).

The Region explained in the response to comments that a decision to issue a UIC permit is based on the SDWA and UIC regulations, and state law is outside the scope of the UIC program. *See* Resp. to Cmts. at 2-4, 22-23, 36-37, 38 (Cmts. #1, 10, 21, 22). Petitioners attempt to address the Region's response to comment by distinguishing the applicability of the Pennsylvania ERA and Clean Streams Law from other state laws. Petitioners argue that "[w]hile the Region claims it has no authority to deny or condition a UIC permit where the permittee has demonstrated full compliance with the statutory and regulatory requirements in states without a similar constitutional provision," the Pennsylvania ERA must be complied with because it is a constitutional provision, and the Clean Streams Law must be followed because it is a "constitutional right" provided for by the ERA and "is more protective than federal regulations." Pet. 23-01, at 26-27, 45; Pet. 24-02, at 29, 47. These arguments fail, however, because Petitioners provide no explanation or legal support as to why these arguments are relevant or put these state laws within the scope of the SDWA UIC permitting program.[8] *See In re Tondu Energy Co*., 9 E.A.D. 710, 716-17 (EAB 2001) (denying petitioner's state constitutional claim as being outside the Board's review in a Clean Air Act Prevention of Significant Deterioration permit appeal). Additionally, Petitioners have not, and cannot, reconcile their position with controlling Board precedent, which the Region and Penneco cite in their response briefs, holding that state law is outside the scope of Board review in a SDWA UIC permit decision. Accordingly, the Board denies review of Petitioners' claims arising under the ERA

[8] The second-filed petition, UIC Appeal No. 24-02, argues that the part 144 regulations require an applicant to submit state permits received or applied for with their UIC permit application, and that without the state permit or state permit application, the Region cannot determine that the conversion and mechanical integrity plans for a well are sufficient. Pet. 24-02, at 14-15. The Region's response brief explains that the petition "misstates the regulatory regime" and that "[a] permittee seeking to use an injection well for disposal must first obtain a Federal UIC permit" under DEP's regulations and, in any event, a state permit is not necessary for the Region to make a determination about the mechanical integrity of the well because the EPA has its own requirements for mechanical integrity. Reg.'s Resp. Br. 24-02 at 39. And the mechanical integrity requirements are reflected in the permit. *See id.*; Permit pt. II.D.2.b, at 8; *see also* Permit pts. II.C.7-8, E.1-2, at 8, 12; *id*. pt. III.A.4, at 13.

and Clean Streams Law, as they are beyond the scope of the SDWA UIC permitting program.[9]

Moreover, "even where a permittee 'has met all federal requirements for issuance of a UIC permit, it is not by virtue of its federal UIC permit shielded from compliance with any valid state or local regulations governing its operations.'" *Archer Daniels*, 17 E.A.D. at 404 (quoting *In re Beckman Prod. Servs.*, 5 E.A.D. 1, 23 (EAB 1994)); *see* 40 C.F.R. § 144.35(c). As the Region observed in its response to comments, the permit clearly articulates that proposition in several places. *See* Resp. to Cmts. at 22 (Cmt. #9); Permit pt. I.A., at 2 (quoting language in 40 C.F.R. § 144.35(c) that "[i]ssuance of this Permit does not * * * authorize

[9] Some of Petitioners' arguments suggest that the Region failed to adequately respond to comments regarding the ERA issue. Petitioners claim that the Region's response is "perfunctory and deficient" in that it only addresses the protection of USDWs and not all the rights addressed in the ERA and tells the reader to look elsewhere in the document. Pet. 23-01, at 28-29; Pet. 24-02, at 31-34. Under 40 C.F.R. § 124.17, the Region is required to "[b]riefly describe and respond to all significant comments" submitted during the public comment period. 40 C.F.R. § 124.17(a)(2). The Region satisfied its obligation with respect to the ERA comments as it explained throughout the response to comment document that state law issues are outside the scope of review for a UIC permit, which the Petitioners themselves recognize to be the Region's stance. *See* Pet. 23-01, at 26-27, Pet. 24-02, at 29; Resp. to Cmts. at 22, 37, 38-39 (Cmts. #9, 10, 21, 22). That the specific response regarding the ERA only addressed the Region's required compliance with the SDWA UIC program is of no moment, where the Region's position that state law issues are outside the scope of the SDWA UIC permitting program is clear throughout the response to comments document. *See In re Pio Pico Energy Ctr.*, 16 E.A.D. 56, 91-93 (EAB 2013) (finding that the Region satisfied its obligation when the response to comments document as a whole demonstrated why extra monitoring was not required even though the specific response did not address why it was not required under EJ protections); *In re Circle T Feedlot, Inc.*, 14 E.A.D. 653, 681 (EAB 2010) (finding that "even though the Region's response was relatively brief and did not directly respond to the commenter's reference to section 2, the Region's discussion * * * as a whole succinctly addressed the essence of and adequately encompassed the issue Petitioner raised"). And with respect to the Region's direction for readers to "look elsewhere" in the response to comments document for discussion of USDW protection, that was entirely appropriate as USDW protection is discussed throughout the response to comment document and "there is no requirement in the regulations that, where the Region's response to a comment relies, at least in part, on its response to another comment, it must explicitly cross-reference such other response by page number or otherwise." *In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 530 (EAB 2006); *see also* Resp. to Cmts. 2-4, 4-13, 22, 23, 31-32 (Cmts. #1, 2, 9, 11, 16).

* * * any infringement of State or local law or regulations"); *id.* I.D.11, at 5 (stating that "[n]othing in this Permit shall be construed to preclude the institution of any legal action or relieve the Permittee from any responsibilities, liabilities, or penalties established pursuant to any applicable State law or regulation")

C. *Petitioners Fail to Demonstrate That the Region's EJ Analysis Constitutes Clear Error, an Abuse of Discretion, or Otherwise Warrants Review*

Petitioners challenge the Region's EJ analysis on the grounds that "[i]t is not clear what standards the Region used" in determining whether the community qualified as an EJ community or "the process by which the Region *chose* to not consider factors that Petitioners and other commenters strenuously raised."[10] Pet. 23-01, at 48, 50; Pet. 24-02, at 50, 51. These arguments are unavailing. We find the record supports the Region's conclusion that no further EJ analysis was needed. As explained below, the Region discussed in the response to comments that demographic information was used to assess the area for EJ concerns. Resp. to Cmts. at 19 (Cmt. #6).

The Region summarized in the response to comments its "screening for Environmental Justice factors in the [area of review]" and its finding that the screening revealed that no further EJ analysis was necessary. *Id.* The Region's EJScreen Report, which was included in the administrative record, offered detailed information about the Region's consideration of EJ issues.[11] *See* U.S. EPA Region

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[10] The second petition, UIC Appeal No. 24-02, adds a reference to alleged violations of "EPA's Environmental Justice Policy" in the context of some additional issues beyond those raised in the first petition (i.e., testing of injected fluids, violations at another well, violations of state law). *See* Pet. 24-02, at 34, 37, 38, 46. All of these references to EJ are addressed by the analysis above.

[11] Petitioners claim that the Region "did not make administrative materials publicly available," Omnibus Reply Brief of Petitioners Protect PT and Three Rivers Waterkeeper to the Response Briefs of the Region and Penneco Env't Sols., LLC, at 14 (April 29, 2024) ("Reply Br. 23-01"), and "did not include clear direction to the public on how to obtain and review all administrative materials," Omnibus Reply Brief of Petitioners Dr. Patricia B. Carr and Mr. Matthew Kelso to the Response Briefs of the Region and Penneco Env't Sols., LLC, at 14 (May 22, 2024) ("Reply Br. 24-02"). Not only did Petitioners fail to preserve these arguments by not filing comments about them, Petitioners did not make these arguments in their opening briefs. *See* 40 C.F.R. §§ 124.11, .19(a)(4)(ii) (requiring all reasonably ascertainable issues and arguments be raised during the comment period and requiring petitions to cite those comments); 40 C.F.R. § 124.19(c)(1) (a "[p]etitioner may

3, *EJScreen Report (Version 2020)* (Oct. 18, 2021) (Reg.'s Resp. 23-01 attach. 24; Reg.'s Resp. Br. 24-02 attach. 27) (A.R. 7) ("EJScreen Report"). That Report specified the area of concern (i.e., 1-mile radius circle); listed the EJ Indices, environmental indicators, and demographic indicators considered; and discussed the results of the EJScreen analysis. *See* EJScreen Report at 1, 3. The documentation accompanying the EJScreen calls for additional review if any of the EJ Indices[12] meet or exceed the 80th percentile in the *nation*. *See* U.S. EPA Region 3, *EJScreen Assessment* 1 (Oct. 18, 2021) (Reg.'s Resp. Br. 23-01 attach. 24, at 1; Reg.'s Resp. Br. 24-02 attach. 27, at 1) (A.R. 7) ("EJScreen Assessment") (explaining that additional review may be appropriate if one or more EJ Indexes reaches or exceeds the 80th percentile in the nation); *see also* U.S. EPA, *EJScreen Environmental Justice Mapping and Screening Tool: EJScreen Tech. Documentation for Version 2.3*, at 42 (revised July 8, 2024) ("EPA identified the 80th percentile filter as that initial starting point. In other words, an area with any of the 13 EJ Indexes at or above the 80th percentile nationally should be considered as a potential candidate for further review."). Additionally, it is the Region's protocol to conduct additional review if any of the EJ Indices meets or exceeds the 80th percentile for the *state*. *See* EJScreen Assessment at 1. In this case, the Region's EJ Indices ranged from the 3rd to 26th percentile in the nation and 6th to 43rd percentile in the state. *See* EJScreen Report at 1. Because none of the EJ

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not raise new issues or arguments * * * in the reply [brief]"); *In re City of Keene*, 18 E.A.D. 720, 747, 754, 760 (EAB 2022) (declining to review issues that could have been raised in petition but were not and were raised for the first time in the reply brief); *see generally* Pet. 23-01; Pet. 24-02. Furthermore, the Statement of Basis provides information about accessing the administrative record. *See* U.S. EPA Region 3, *Statement of Basis U.S. EPA Underground Injection Control (UIC) Draft Class II-D Permit PAS2D702BALL* 5 (undated) (Reg.'s Resp. Br. 23-01 attach. 1; Reg.'s Resp. Br. 24-02 attach. 3) (A.R. 4).

[12] EJ Indices are derived from environmental indicators and demographic indices using specific mathematical formulas. *See* U.S. EPA, *EJScreen Environmental Justice Mapping and Screening Tool: EJScreen Tech. Documentation for Version 2.3*, at 36-37 (revised July 8,2024) (explaining how EJ Indices are calculated). The 80th percentile threshold applies to EJ Indices rather than to environmental indicators, demographic indices, or simple mapping plots of emission levels. *See id*. at 42; *see also* Pet. 23-01 attachs. 25-28; Pet. 24-02 attachs. 25-28.

Indices met or exceeded 80th percentile for the nation or the state in this case, the Region did not conduct further analysis. *See* EJScreen Assessment at 1.[13]

Nonetheless, as explained in the response to comments, the Region went beyond the minimum regulatory requirements of the UIC program, while remaining within the bounds of the UIC regulations by expanding public participation and exercising its discretion under its UIC omnibus authority to "ensure that it is issuing a final permit with conditions necessary to prevent the migration of fluids into underground sources of drinking water." Resp. to Cmts. at 20-21 (Cmt. #6); *see also* 42 U.S.C. § 300h-3(b)(3) (providing the Administrator with authority to condition permits "to assure that the operation of the well will not contaminate the aquifer of the designated area in which the well is located so as to create a significant hazard to public health"); 40 C.F.R. § 144.52(a)(9) (requiring the imposition of "such additional conditions as are necessary to prevent the migration of fluids into underground sources of drinking water"); *Envotech*, 6 E.A.D. at 281 (quoting 40 C.F.R. § 144.52(a)(9)). With respect to public participation, the Region held a second public hearing and extended the public comment period to span 104 days. With respect to permit conditions, the Region included the following

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[13] Petitioners attach their own EJScreen report to their petitions, but that report does not appear to have been submitted to the Region during the comment period. *See* Pet. 23-01 attach. 20; Pet. 24-02 attach. 20. In response to the Region and Penneco's objections to such post-decisional materials, Petitioners argue that part 124 "incorporate[s] the requirement that Petitioners include support for their factual assertions." Reply Br. 23-01, at 14; Reply Br. 24-02, at 14. While 40 C.F.R. § 124.19(a)(4)(i) requires petitioners to provide legal and factual support for their arguments, the very next regulatory provision requires petitioners to show that the documentation for their arguments was provided during the public comment period unless petitioners have an explanation for why they were not provided at that time. 40 C.F.R. § 124.19(a)(4)(ii); *see also* 40 C.F.R. § 124.13. The Board's precedent is clear that "documents submitted subsequent to permit issuance cannot be considered part of the administrative record," unless certain limited exceptions apply. *Dominion Energy*, 12 E.A.D. at 518; *see also In re Gen. Elec. Co.*, 18 E.A.D. 575, 609-11 (EAB 2022). Petitioners offer no explanation for why their EJScreen report or any of the other post-decisional documents included with the petitions fall within those exceptions and the Board does not believe the exceptions apply.

In any event, even if Petitioners' EJScreen report had been part of the record, it would not change the Board's analysis. Petitioners' report showed EJ indices ranging from the 13th percentile to 67th percentile for the nation and state. *See* Pet. 23-01 attach. 20, at 2; Pet. 24-02 attach. 20, at 2. Thus, even Petitioners' own report shows indices that are all below the 80th percentile threshold in EPA's documentation for EJScreen.

requirements that are more stringent than the minimum required by the SDWA: (1) the permittee must conduct a mechanical integrity test every two years rather than every five years, (2) the permittee must cease injection if the monitoring well's fluid level rises to within 100 feet of the USDW, and (3) the permit term is ten years rather than for the life of the well. *See* Resp. to Cmts. at 2-3, 15 (Cmts. #1, 3); Permit at 1, 8. The Region explained that it is authorized to include permit conditions such as these "to protect drinking water for all communities," Resp. to Cmts. at 19 (Cmt. #6), and that such "authority applies in all cases, 'regardless of the composition of the community surrounding the proposed injection site.'" *Id*. at 20.

Given that we have determined that the Region properly conducted the EJScreen analysis, applied the appropriate thresholds, and concluded that further evaluation of the site was not necessary, we find the record supports the Region's determination that no further EJ analysis was needed. The Region also took additional steps within its existing legal authority with respect to public participation and the stringency of the permit conditions to address any EJ concerns for all communities surrounding the well. In addition, Petitioners failed to confront the Region's response to comments on this issue, which by itself is fatal to its petition on this issue. *See* 40 C.F.R. § 124.19(a)(4)(ii) (requiring petitioners to "explain why the [permit issuer's] response to the comment was clearly erroneous or otherwise warrants review"). Thus, with respect to the Region's consideration of EJ issues, Petitioners have not demonstrated clear error or abuse of discretion.

D. *Petitioners Fail to Preserve Their Arguments about the Energy Policy Act Exclusion, Definition of Class II Wells, Financial Assurance, and Equal Protection*

Petitioners make several other arguments challenging Penneco's UIC permit. Specifically, Petitioners claim: (1) an amendment in the Energy Policy Act of 2005 that exempts certain oil and gas activity from regulation under the SDWA, often referred to as the "Halliburton Loophole" or "Halliburton Exclusion" (hereinafter "Exclusion"), violates the ERA and the "EPA's Environmental Justice Policy"; (2) the UIC Class II regulatory definition precludes the injection of fracking fluids into Class II wells; (3) the financial assurance required in the permit is insufficient and violates the Pennsylvania ERA, among other things; and (4) all of the issues raised in the petitions have denied Petitioners Equal Protection in violation of the U.S. Constitution. Pet. 23-01, at 3, 7-12, 36-39, 47, 52-55, 56; Pet. 24-02, at 2, 3-5, 8-13, 38-42, 48-49, 53-56, 57. The Region and Penneco respond that Petitioners have failed to preserve these arguments. Reg.'s Resp. Br. 23-01,

at 16-20; Reg.'s Resp. Br. 24-02, at 15-19; Penneco's Resp. Br. 23-01, at 16-18; Penneco's Resp. Br. 24-02, at 19-21. We agree with the Region and Penneco.

The part 124 regulations state that a petitioner "must demonstrate * * * that each issue being raised in the petition was raised during the public comment period (including any public hearing) to the extent required by § 124.13." 40 C.F.R. § 124.19(a)(4)(ii). Petitioners claim, "There is no requirement that comments include legal analyses of regulations, legal arguments, or legal conclusions." Omnibus Reply Brief of Petitioners Protect PT and Three Rivers Waterkeeper to the Response Briefs of the Region and Penneco Env't Sols., LLC, at 13 (April 29, 2024) ("Reply Br. 23-01"); Omnibus Reply Brief of Petitioners Dr. Patricia B. Carr and Mr. Matthew Kelso to the Response Briefs of the Region and Penneco Env't Sols., LLC, at 14 (May 22, 2024) ("Reply Br. 24-02"). However, § 124.13 requires any person who believes that a condition or draft permit decision is inappropriate to "raise all reasonably ascertainable issues" and "submit all reasonably available arguments supporting their position" during the public comment period. 40 C.F.R. § 124.13. Permit issuers "are not expected to be prescient in their understanding of vague or imprecise comments;" rather, "commenters must present issues with sufficient specificity to apprise the permit issuing authority of the issues being raised." *In re Sutter Power Plant*, 8 E.A.D. 680, 694 (EAB 1999) (quoting *In re Rockgen Energy Ctr.*, 8 E.A.D. 536, 547-48 (EAB 1999)). Consistent with these principles, the Board has found that arguments were not preserved for review when comments lacked clarity or specificity. *See, e.g.*, *In re Powertech (USA) Inc.*, 19 E.A.D. 23, 32-33 (EAB 2024) (holding petitioners failed to preserve an argument because comments provided "nothing more than a vague, conclusory reference" to the statute and lacked sufficient specificity); *In re City of Lowell*, 18 E.A.D. 115, 191 n.45 (EAB 2020) (finding argument raised during public comment period lacked sufficient clarity to enable a meaningful response when regulation at stake in petition was not cited in comments).

This requirement for issue preservation is an important element of the permitting process because it ensures that the Region is given an opportunity to respond to issues raised about the draft permit. *See id.* at 183. Furthermore, the specificity requirement is not an "arbitrary hurdle"; it "serves important purposes such as 'ensur[ing] that the permit issuer has the first opportunity to correct any potential problems in the draft permit'" and to respond to those issues prior to finalization of the permit. *In re Gen. Elec., Co.*, 18 E.A.D. 575, 636 (EAB 2022) (citing *In re Gen. Elec., Co.*, 17 E.A.D. 434, 583 (EAB 2018)), *pet. for review denied sub nom. Housatonic River Initiative v. EPA*, No. 22-1398 (1st Cir. Jul. 25, 2023). The failure to preserve arguments for Board review is a fatal flaw. *See* 40 C.F.R. § 124.13; *In re City of Keene*, 18 E.A.D. 720, 743 n.19 (EAB 2022).

For the reasons explained below, the Board denies review of the four arguments listed above as Petitioners failed to preserve these issues.

1. *Energy Policy Act of 2005 Exclusion*

The petitions emphasize that "[i]mportant to Petitioners is the question of whether the Halliburton Loophole violates the Pennsylvania Constitution's Environmental Rights Amendment and the EPA's Environmental Justice Policy." Pet. 23-01, at 56; *see also* Pet. 24-02, at 57. In their replies, Petitioners dispute the Region's and Penneco's arguments that the Exclusion claim was not preserved, arguing that that they were not required to include "legal analyses of regulations" or "legal arguments" in their comments on the draft permit and that the Petitioners appropriately refer to their comments in their petitions. Reply Br. 23-01, at 13; Reply Br. 24-02, at 14. This argument is unavailing as Petitioners identify nowhere in the public comment period where they, or any other commenter, raised the Exclusion argument either explicitly or implicitly. *See, e.g.*, *City of Lowell* at 136-37, 159 n.24, 167-68, 171, 183 (denying review of multiple issues for failure of petitioner to demonstrate that they had been raised in comments); *Gen. Elec. Co.,* 17 E.A.D. at 579, 582-83 (denying review on two issues that had not been raised during the comment period). Furthermore, this issue would have been reasonably ascertainable during the public comment period. *See* 40 C.F.R. § 124.13. As the arguments were not preserved for review, the Board denies review of claims related to the Exclusion.

Even if this issue had been preserved, the Board would still deny review. Petitioners fail to demonstrate the relevancy of their Exclusion argument to this permit or the permitting decision process. *See* 40 C.F.R. § 124.19(a)(4)(i) ("[A] petition for review must identify the contested permit condition or other specific challenge to the permit decision."). Petitioners summarize the Exclusion and conclusively state that the permit "would allow Penneco to dispose of 'fluids' * * * without being subject to regulation under the act" but provide no explanation as to how the Exclusion impacted the issuance of this permit. Pet. 23-01, at 38-39; Pet. 24-02, at 41. As the Region argued in its response briefs, "[t]he Exclusion does not affect EPA's authority to regulate the disposal by injection of hydraulic fracturing wastewater." Reg.'s Resp. Br. 23-01, at 23; Reg.'s Resp. Br. 24-02, at 21. Petitioners offer no reply to the Region's argument. Additionally, the Petitioners' claim that the Exclusion "violates" the ERA is outside the scope of the Board's review for the reasons discussed in Part IV.B above. To the extent that Petitioners are challenging the Exclusion (amendment in the 2005 Energy Policy Act) itself, the Board is not the appropriate forum to do so. *See In re Chevron Mich. LLC*, UIC Appeal No. 13-03, at 19 (EAB Nov. 7, 2013) (Order Denying Review) (stating that

a permit appeal is not the appropriate avenue for petitioners to question the structure of the UIC regulations or the policy judgments underlying them).

2. *Class II Wells Definition*

Petitioners argue that a Class II UIC permit cannot be issued for the injection of fluids from oil and gas production that involves fracking. Petitioners base their claim on the regulatory definition of Class II UIC wells, which states that such wells may "inject fluids: (1) [w]hich are brought to the surface in connection with natural gas storage options, or *conventional* oil or natural gas production." 40 C.F.R. § 144.6(b)(1) (emphasis added). Petitioners highlight what they believe to be "differences between conventional wells and unconventional ('fracked') wells." Pet. 23-01, at 8; Pet. 24-02, at 9. In Petitioners' estimation, an unconventional well "involves fracking in 'unconventional' low permeability formations," whereas conventional wells do not involve fracking as they "are located in highly permeable formations where oil and gas flow out easily," i.e., conventional formations. Pet. 23-01, at 8; *see also* Pet. 24-02, at 9. In other words, Petitioners believe unconventional production involves fracking and conventional production does not. Petitioners argue that because § 144.6(b)(1) limits Class II wells to injection of fluids from "conventional oil or natural gas production," Class II wells cannot inject fluids from unconventional (i.e., fracking) oil and gas production.

Petitioners' arguments regarding the meaning of "conventional" in § 144.6(b)(1) were not preserved for review. In reply to the Region's and Penneco's claims that this issue was not preserved, Petitioners maintain that such arguments are "nonsensical" and state that "[t]he Comments are the basis for the legal arguments set forth in the Petition, to which Petitioners refer for the appropriate citations to the Comments." Reply Br. 23-01, at 13; *see also* Reply Br. 24-02, at 14. Petitioners' replies are not sufficient. Rather than identifying the comments relevant to this issue as required by the regulations, *see* 40 C.F.R. § 124.19(a)(4)(ii), Petitioners' reply briefs broadly claim, without any specificity, that citations to the comments can be found in the Petition, *see* Reply Br. 23-01, at 13; Reply Br. 24-02, at 14. However, in our own review of the petitions and the record, we have been unable to locate any comment during the public comment period raising the petition's argument about "conventional" in § 144.6(b)(1). In addition, the question about the meaning of "conventional" would have been reasonably ascertainable during the public comment period. *See* 40 C.F.R. § 124.13. Accordingly, this issue has not been preserved for Board review and is therefore denied on this ground. *See, e.g.*, *In re Tucson Elec. Power*, 17 E.A.D.

675, 689 (EAB 2018) (holding that argument raised for the first time in a petition "has not been preserved for Board review").

We note, however, that the Region and Penneco fundamentally disagree with Petitioners' position on the meaning of "conventional" and the scope of Class II wells. The Region and Penneco argue that oil and natural gas production in both conventional and unconventional wells and formations can include fracking and, as a result, the reference to "conventional" in 40 C.F.R. § 144.6(b)(1) does not prevent Class II wells from injecting fracking fluids.[14] *See* Reg.'s Resp. Br. 23-01, at 30-31; Reg.'s Resp. Br. 24-02, at 27-28; Penneco's Resp. Br. 23-01, at 6; Penneco's Resp. Br. 24-02, at 9. They admit the regulations do not define "conventional," but maintain that the SDWA and its implementing regulations intend Class II permits to authorize wells to accept wastewater from all varieties of oil and natural gas production. Reg.'s Resp. Br. 23-01, at 31-41; Reg.'s Resp. Br. 24-02, at 26-36; Penneco's Resp. Br. 23-01, at 5-8; Penneco's Resp. Br. 24-02, at 8-12.

We observe that the premise of Petitioners' argument—that fracking is not "conventional oil or gas production"—seems to be incorrect. Fracking, which originated in the mid-1800s, is the practice of injecting high-pressure fluids and solids to break open impermeable rock formations to allow oil and gas to flow into a well. *See* U.S. EPA, *Hydraulic Fracturing for Oil and Gas: Impacts from the Hydraulic Fracturing Water Cycle on Drinking Water in the United States* 3-3 to 3-4 (Dec. 2016) (explaining hydraulic fracturing) (A.R. 50); Reg.'s Resp. Br. 23-01, at 30-31; Reg.'s Resp. Br. 24-02, at 27-28. Because modern production techniques (i.e., unconventional production) did not exist in the 1800s, the use of fracking during that time period would mean fracking was used with traditional production techniques (i.e., conventional production). Thus, the inclusion of "conventional" in 40 C.F.R. § 144.6(b)(1) would not have been intended to prohibit injection of fracking fluids in Class II wells as Petitioners argue.

3. *Financial Assurance*

Petitioners argue that the level of financial assurance required by the permit is not sufficient and violates the Pennsylvania ERA. Pet. 23-01, at 52-55; Pet. 24-02, at 53-56. The permit requires Penneco to maintain financial responsibility

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[14] *See also* U.S. EPA, *Class II Oil and Gas Related Injection Wells*, https://www.epa.gov/uic/class-ii-oil-and-gas-related-injection-wells (last visited Nov. 25, 2024) ("Wastewater from hydraulic fracturing activities can also be injected into Class II wells.").

and resources to close, plug, and abandon the well in an amount of at least $13,397.10. Permit pt. III.D.1, at 14-15. Petitioners reference various sources that address the cost of plugging an abandoned well, which range from $2,500 to $800,000 per well. Pet. 23-01, at 52-54; Pet. 24-02, at 53-55. Petitioners go on to explain the environmental and health problems that can arise from abandoned, unplugged wells. *See* Pet. 23-01, at 54-55; Pet. 24-02, at 55-56.

The Region and Penneco argue that Petitioners have failed to preserve the issue of the adequacy of financial assurance requirements, that they rely on materials not in the administrative record, and that consideration of the Pennsylvania ERA falls outside the scope of the Board's jurisdiction. Reg.'s Resp. Br. 23-01, at 17-23, 54; Reg.'s Resp. Br. 24-02, at 16-20, 22-24; Penneco's Resp. Br. 23-01, at 14-16. The Region and Penneco also argue that Petitioners did not establish clear error with regard to the amount of financial assurance required by the permit. *See* Reg.'s Resp. Br. 23-01, at 54-55; Reg.'s Resp. Br. 24-02, at 49-50; Penneco's Resp. Br. 23-01, at 22.

Petitioners failed to demonstrate that their challenge to the amount of financial assurance was raised with "a reasonable degree of specificity and clarity during the public comment period" as required by 40 C.F.R. §§ 124.13, .19(a)(4)(ii). *See Westborough*, 10 E.A.D. at 304. In reply to the Region and Penneco's responses about preservation of this issue, Petitioners claim that the Region did not "give credence to the comments that were received in [sic] its Permit conditions, including with respect to financial assurances," Reply Br. 23-01, at 12-13; Reply Br. 24-02, at 13, and that citations for the comments are provided in the petition, *see* Reply Br. 23-01, at 13; *see also* Reply Br. 24-02, at 14. The petition does not, however, specifically identify any comments that raised the adequacy of financial assurance despite the fact that the issue was reasonably ascertainable during the public comment period. A review of the petition, the written comments, and hearing transcripts does not reveal any comments about this issue. Accordingly, Petitioners' challenge to the adequacy of the financial assurance requirements has not been preserved for Board review and is rejected on that basis. *See, e.g.*, *Tucson Elec. Power*, 17 E.A.D. at 689.

In addition, because Petitioners base their argument about financial responsibility on an alleged violation of the Pennsylvania ERA, which is a state law, their claim falls outside the scope of the Board's review of UIC permit appeals. *See* Part IV.B, above (explaining that a permittee's compliance with state law is outside the scope of the SDWA UIC program).

Even if we were to consider the Petitioners' arguments on the merits, the Petitioners have not demonstrated that the Region clearly erred with regard to the financial assurance requirements in the final permit. We observe that the record reflects the Region applied its expertise, considered data in the record, and concluded that $13,397.10 was reasonable. The Region determined that the funding provided by the irrevocable letter of credit will cover the estimated cost to close, plug, and abandon the injection well based upon an independent, third-party professional's estimate of the costs associated with that well. *See* Reg.'s Resp. Br. 23-01, at 54-55; Reg.'s Resp. Br. 24-02, at 49-50; Resp. to Cmts. at 17 (Cmt. #3) (responding to comment on ensuring well integrity and noting, among other permit provisions, the financial assurance requirements). Petitioners fail to address the Region's assessment of financial assurance. Instead, at best, Petitioners point to generic studies about the cost of plugging wells; they do not offer materials specific to this particular well. *See* Pet. 23-01, at 52-54; Pet. 24-02, at 53-55. At no point do Petitioners directly address the Region's basis for setting the financial assurance level for the injection well that is the subject of the challenged permit. Instead, the Petitioners point to a state constitutional requirement for a $2,500 bond, but this does not buttress Petitioners' argument for a higher level of financial responsibility as the permit requires Penneco to maintain financial responsibility and resources to close, plug, and abandon the injection well in an amount of at least $13,397.10. *See* Pet. 23-01, at 52; Pet. 24-02, at 53-54; Permit pt. III.D.1, at 14-15. Clear error or abuse of discretion in a permit issuer's technical determination cannot be "established simply because petitioners document a difference of opinion or an alternative theory." *NE Hub Partners,* 7 E.A.D. at 567.

4. *Equal Protection*

In their petition, Dr. Carr and Mr. Kelso make a passing reference to being denied equal protection under the U.S. Constitution.[15] Pet. 24-02, at 2, 19, 38. Petitioners state that they "challenge the Region's compliance with the EPA's Environmental Justice Policy, specifically including Article 1, Section 27 of the Pennsylvania Constitution, consideration of environmental justice factors, compliance with state and federal laws, and the utilization of federal exemptions, which deny Petitioners equal protection under the law, specifically including the Equal Protection Clause of the United States Constitution." *Id*. at 2. Neither the petition nor the reply brief meaningfully expands on that statement.

[15] This claim is only raised in UIC Appeal No. 24-02.

As with the preceding two issues, Petitioners have not demonstrated that this issue was raised with "a reasonable degree of specificity and clarity" during the public comment period or public hearing. 40 C.F.R. §§ 124.13, .19(a)(4)(ii). Petitioners state that the relevant comments are cited in the petition, *see* Reply Br. 24-02, at 14, but they did not actually identify any comments that raised this issue. Our own review of the petition and the comments submitted during the public comment process did not identify comments about this issue, which was reasonably ascertainable during the public comment period. Accordingly, this issue has not been preserved for Board review, and we deny review on this issue. *See, e.g.*, *Tucson Elec. Power*, 17 E.A.D. at 689.

V. *CONCLUSION*

For the reasons stated above, the Board denies the petitions for review. [16]

So ordered.

[16] We have considered all of the arguments raised in the petitions and reply briefs and we deny review as to all of them, whether or not they are specifically discussed in this order. All pending motions are denied as moot.