

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

In Re:	:	
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	:	Permit Appeal
Penneco Environmental Solutions, LLC	:	UIC 23-01
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UIC Permit No. PAS2D702BALL	:	
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MOTION REQUESTING OFFICAL NOTICE BY THE BOARD (CORRECTED)

On April 12, 2024, the Region filed a motion requesting that the Board take official notice of Agency documents cited in the Response to Petition (“Response”) that the Region also filed that day. Prior to filing the Motion, the counsel for the Region did not ascertain whether the other parties to this appeal opposed or concurred or objected to the motion which is required by 40 C.F.R. § 124.19(f)(2). Upon realized the error, counsel for the Region contacted both counsel for the Petitioners and the Permittee to learn their position. Counsel for the Petitioners replied that they opposed the Motion. Counsel for the Permittee replied that it concurred with the Motion. Except for correcting the error, in all other respects the Motion remains the same.

The Region initially cites all the Agency 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 four 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. Three of the documents are available on EPA’s public web site 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 36, 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 38, 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 40, available at 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 and the next document provide 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 41, available at 64 FR 68545 (Dec. 7, 1999).

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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