

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

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In re:	)	
	)	
Penneco Environmental	)	UIC Appeal No.: UIC 24-02
Solutions, LLC	)	
	)	
Class II-D Injection Well,	)	
Plum Borough, Allegheny County	)	
Pennsylvania	)	
	)	
Permit No. PAS2D702BALL	)	

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**JOINT REPLY BRIEF OF PETITIONERS DR. PATRICIA B. CARR AND  
MATT KELSO TO THE REGION’S MOTION FOR LEAVE TO FILE SUR-  
REPLY TO PETITIONERS’ OMNIBUS REPLY**

On May 22, 2024, Petitioners filed their Omnibus Reply to Region 3’s and Penneco Environmental Solutions’ Responses to the Petition (“Reply”). On June 7, 2024, the Region filed a Motion for Leave to File Sur-Reply to the Petitioners’ Omnibus Reply (“Reply”). The Region argues that Petitioners raised two (2) new arguments in the Reply that were not made in the Petition.<sup>1</sup> Petitioners oppose the Motion because the issues presented by the Region can be fully adjudicated by the Board by virtue of the Region’s Response, which contain admissions as to the relevant issues. Petitioners specifically respond to each claim as follows:

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<sup>1</sup> Motion at 1.

1. The Region failed to follow the requirements of two Executive Orders issued by President Biden that require Federal Government Agencies to account for Environmental Justice factors in carrying out their duties. Reply at 9-12.

**Response:**

The Petition includes references to the EPA’s Environmental Justice Policy. Petition at 1, 2, 4, 19, 23, 34, 37-40, 48-51, and 57. The Petition also included a link to a public page of the EPA, “Learn About Environmental Justice,” which specifically identified Executive Orders 12898, 14096, and 14008. Petition at 46, FN 125; <https://www.epa.gov/environmentaljustice/learn-about-environmental-justice>.

This website, on which Petitioners and the public relies, not only identifies the foregoing executive orders but also the fact that the statutes that EPA implements provide the Agency with authority to consider and address environmental justice concerns. *Id.* Accordingly, the Petition put the Region was on notice of the applicable executive orders and other EJ factors it should have considered prior to issuing the Permit.

The Region has had two opportunities to address its consideration and application of the Environmental Justice Policy. First, the Region’s Response to Comments (“RTC”), which are not dated but the Region issued on September 21, 2023, includes a comment that specifically pertains to the EPA’s Environmental Justice Policy, Comment 6. RTC at 18-21. In the RTC, the Region’s response included that “As noted in the response to comment 22, the UIC Program’s regulatory criteria prescribes the

factors EPA can consider when it determines whether to issue a UIC well permit. The surface location of a UIC well is not one of the regulatory criteria.” RTC at 19. The Region also states that it performed an “EJ Screen” and that the “screening found that further evaluation of the site for Environmental Justice[s] [sic] was not necessary.” These conclusory statements in the RTC support Petitioners’ arguments in the Petition that the Region clearly failed to properly apply the EPA’s Environmental Justice Policy in its decision.

Second, the Region had the opportunity to respond to its application of the EPA’s Environmental Justice Policy in its response to the Petition but chose only to address one executive order. As argued in the Petition, among other things, the Region did not identify the EJ Screen it performed, nor did it provide a full analysis of its application of the EPA’s Environmental Justice Policy as required thereunder. Petition at 49. The Petition includes certain factors identified through Petitioners’ EJ Screen that the Region failed to consider, including:

- A. The EJ Screen that the Region references in the administrative record should have identified that the 1/4-mile radius around the Injection Well includes impaired waters and does not meet the National Ambient Air Quality Standard. Petition at 25.

- B. Using the EPA’s EJ Screen, the following percentiles relate to the site of the Injection Well and surrounding communities as compared to the rest of the state:
- i. Cancer 80-95%;
  - ii. Air Toxics Cancer Risk – 90-95%;
  - iii. Particulate Matter 2.5 – 80-95%; and
  - iv. Toxic Releases to Air – 80-90%.

The Petition further states that “This is information that the EPA had in its possession at the time it issued the Permit. The Region claims that it performed an EJ Screen but “that further evaluation of the site for Environmental Justice issues was not necessary.” It is not clear what standards the Region used to evaluate whether the “site,” where people have above-average cancer rates, was entitled to an “evaluation” for “further” Environmental Justice issues. This violates the EJ Policy and the Environmental Rights Amendment.” Petition at 50.

In its Response filed on May 9, 2024, the Region chose only to identify Executive Order 12898 that it used as part of its review. The Region failed to identify two other relevant Executive Orders, 14096 and 14008 or any other environmental justice factors and are admissions by the Region that it erred by not fully considering environmental justice factors.

Petitioners’ references to two additional executive orders in their Reply are not “new issues.” The Region had the opportunity and obligation to address its application of the EPA’s Environmental Justice Policy as a whole in its response to comments and

in its Response to the Petition. Notwithstanding the fact that the Permit should be rescinded because it allows for the injection of fluids from unconventional oil and gas operations, the Region's insufficient responses justify a remand of the Permit on environmental justice factors alone. Moreover, the Region's request to file a sur-reply is an admission that it failed to properly consider and respond to the Petition with respect to environmental justice factors.

Upon such remand, the Region should be required to identify all environmental justice concerns raised by the public and to perform an updated analysis of the impact the issuance of the Permit and the operations thereunder would have on these concerns under the EPA's Environmental Justice Policy. The Region should not be permitted to cure such errors in its response to comments and its Response to the Petition through a sur-reply.

2. The Region did not make the administrative record available during the public comment period. Reply at 14.

**Response:**

Petitioners had located an index listing the administrative materials online and included it with their Petition, which had **13 entries**. Petition, Att. 7. Petitioners were only made aware of the additional materials that the Region included in the Administrative Record when the Region filed its Response on April 12, 2024, after the Petition was filed. Region Response, Att. 27. The administrative record index that the Region filed with its Response contains **73 entries**. The Region also failed to include

each of the documents in the administrative record when it filed its Response.

One of the documents that the Region included in its administrative records index is the EPA's publication of "EPA Legal Tools to Advance Environmental Justice" Region Response, Att. 27, ¶ 27.<sup>2</sup> This publication also includes a "Cumulative Impacts Addendum." Nowhere in the RTC or the Region's Response is the Region's identification and analysis under this publication and this failure further supports Petitioners' arguments made above with respect to the Region's failure to properly consider environmental justice factors.

In addition, the public notice the Region issued prior to issuing the Permit and as set forth in the Region's Response, Exhibits 3 and 5, state: "The administrative record for this permitting action is available for review. The draft permit, the statement of basis for the draft permit, and permit application materials have been posted on the EPA's website." This notice is insufficient under 40 C.F.R. § 124.9 because it does not detail each of the documents the Region relied on nor does it instruct the public on how to obtain the specific administrative materials. In addition, the Statement of Basis on page 5 was defective as it did not specify the materials that the Region relied upon in making its decision. Petitioners and the public had no way of knowing that the administrative materials consisted of more than what was set forth in the notice, the direction to the

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<sup>2</sup> [https://www.epa.gov/ogc/epa-legal-tools-advance-environmental-justice#:~:text=EPA%20Legal%20Tools%20to%20Advance%20Environmental%20Justice%20\(EJ%20Legal%20Tools,%2C%20Indigenous%20peoples%2C%20and%20low%2D](https://www.epa.gov/ogc/epa-legal-tools-advance-environmental-justice#:~:text=EPA%20Legal%20Tools%20to%20Advance%20Environmental%20Justice%20(EJ%20Legal%20Tools,%2C%20Indigenous%20peoples%2C%20and%20low%2D)

EPA's website did not specify that there were other materials that the Region relied on, and the Region did not provide specific instructions for the public to obtain such materials.

Because Petitioners only had notice of all the materials in the administrative record after the Petition was filed and after the Region filed its Response, Petitioners' arguments regarding the accessibility of these materials could only be made in its Reply filed on April 29, 2024. The Permit should be remanded on this basis alone to provide Petitioners and the public with the opportunity to access and review these materials. The Region has already admitted its errors, and the Region should not be given the opportunity to cure such failures through a sur-reply.

## **Conclusion**

Unless the Board determines that further briefing on these issues would assist the Board in resolving disputed claims, the Region's Motion should be denied. *See In re Essroc Cement Corp., RCRA Appeal No. 13-03* at 1 (EAB Sept. 25, 2013) (*citing E.g. In re ArcelorMittal Cleveland, Inc., NPDES Appeal No. 11-01* at 1 (EAB Dec. 9, 2011) (Order Granting in Party EPA's Motion to File Surreply, Denying Petitioners' Request to Provide Additional Information and Granting Oral Argument).

The Region had the obligation to fully respond to the two remaining issues above in ¶¶ 1 and 2 in the RTC and in the Region's Response because they are not "new issues" as they were identified in the Petition. Petitioners' claims regarding the Region's permitting decisions align with and relate back to the public comments, and therefore,

the Region was properly put on notice of these issues. The Region's Response to the Petition was the catalyst for Petitioners' Reply in which Petitioners responded to the defenses set forth in the Region's Response. The Region's Motion, however, can be construed as an admission that the Region committed errors of law and abused its discretion with respect to these issues.

Petitioners continue to request oral argument in this matter, and should the Board grant the Region's Motion, Petitioners respectfully request that they be provided fifteen (15) days to fully respond to the Motion. Moreover, Petitioners defer to the Board's determination of whether it would benefit from additional briefing on any of the issues raised in the Petition as Petitioners would welcome such request to further assist the Board in resolving this matter. Petitioners request that Permittee not be permitted to file a response, participate in further briefing, or oral argument on the issues raised in the Motion as it failed to file a motion for leave to file a sur-reply as to these issues; Permittee should only be allowed to participate in these issues to the extent set forth in its separate response to the Petition.

Respectfully submitted,

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*Attorney for Petitioners*

June 20, 2024

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing Reply Brief of Petitioners in the matter of Commercial Underground Injection Control (UIC) Class II-D Permit No. PAS2D702BALL to Penneco Environmental Solutions, LLC for the Disposal of Oil and Gas Production Fluid in Plum Borough, Allegheny County, Pennsylvania, were served on all counsel of record via email in accordance with the Environmental Appeals Board's September 21, 2020 Revised Order Authorizing Electronic Service of Documents in Permit and Enforcement Appeals on this 20th day of June, 2024.

Respectfully submitted,

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