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

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

PERMITEE'S RESPONSE TO PETITION FOR REVIEW

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I. INTRODUCTION

Penneco Environmental Solutions, LLC ("Penneco") is the permittee for Underground Injection Control (UIC) permit no. PAS2D702BALL ("UIC Permit") at issue in this Petition for Review filed by Dr. Patricia B. Carr and Mr. Matthew Kelso ("Petitioners"). Petitioners largely repeat the same issues and arguments as the Petition for Review Docket No. 23-01, but because the cases have not been consolidated, Penneco must repeat its responses to those arguments herein.

Despite the length of and rhetoric in the Petition, Petitioners cannot and do not point to any error of law or abuse of discretion that the United States Environmental Protection Agency ("EPA") committed in its issuance of the permit. Petitioners simply bemoan the inadequacy of the law and the program required by and established under the Safe Drinking Water Act, 42 U.S.C. § 300f *et seq.* ("SDWA"). It is not this UIC Permit that Petitioners oppose; it is the oil and gas industry.

Petitioners assert that EPA was to do more than follow the applicable law, that EPA was to create a heightened standard and decline to issue the permit, based on Petitioners' view that federal law does not protect the environment from alleged, speculated, impacts from the underground injection of wastewater from the oil and gas industry. This Board is not the forum in which Petitioners' quest can be resolved.

Under the applicable law and Board precedent, this UIC Permit was issued pursuant to the correct process, with due consideration of all applicable factors and public comments, with conditions that require well construction, operation and monitoring to ensure that injected fluids stay in the injection zone, 1,328 feet below the lowest underground drinking water source. If Petitioners were in charge, they would apply a different process, a different law, and deny all UIC Class II Permits. Petitioners cannot change the law and the Board should deny review.

II. STANDARD OF REVIEW

The Board's review of UIC permits is governed by EPA's permitting regulations at 40 C.F.R. Part 124. A petitioner appealing under Part 124 bears the burden of demonstrating that review is warranted. *In re Envtl. Disposal Sys. Inc*., 12 E.A.D. 254, 264 (EAB 2005). The petitioner must identify "the contested permit condition[s] or other specific challenge to the permit decision and clearly set forth, with legal and factual support, petitioner's contentions for why the permit decision should be reviewed." 40 C.F.R. § 124.19(a)(4)(i); *In re Archer Daniels Midland Co*., 17 E.A.D. 380, 382 (EAB 2017). Review of permitting decisions under Part 124 "should be only sparingly exercised." 45 Fed. Reg. 33290, 33412 (May 19, 1980); *In re Beeland Grp., LLC,* 14 E.A.D. 189, 195-96 (EAB 2008).

The Board denies a petition for review unless the petitioner demonstrates that the permit decision is based on a clearly erroneous finding of fact or conclusion of law or involves an exercise of discretion that warrants review under the law. *Beeland*, 14. E.A.D. at 195-196. A petitioner may not rely solely on previous statements of objections during the administrative process leading up to issuance of the permit. *In re Penn. General Energy Co., LLP,* 16 E.A.D. 498, 503 (EAB 2014). Instead, a petitioner must demonstrate why EPA's response to those objections is clearly erroneous or otherwise warrants review. *Beeland*, 14 E.A.D. at 196; *Envtl. Disposal Sys*., 12 E.A.D. at 264. The Board will uphold EPA's reasonable exercise of discretion if that decision is cogently explained and supported in the record. *In re Jordan Dev. Co., LLC*, 18 E.A.D. 1, 5 (EAB 2019). The Board typically defers to EPA's technical expertise and experience on matters that are fundamentally technical or scientific in nature, as long as EPA adequately explains its rationale and supports its reasoning in the administrative record. *Beeland,* 14 E.A.D. at 199.

In petitions for review of UIC permits, the Board's authority is limited to the goals of the UIC program to protect underground sources of drinking water ("USDWs"). *Envtl. Disposal Sys*., 12 E.A.D. at 266. "[T]he SDWA … and the UIC regulations … establish the *only* criteria that EPA may use in deciding whether the grant or deny an application for a UIC permit." *In re Envotech, LP*, 6 E.A.D. 260, 286 (EAB 1986) (emphasis in original).

Moreover, in considering a petition, the Board evaluates whether the petitioner met threshold procedural requirements, including whether an issue has been preserved for Board review. 40 C.F.R. §§ 124.13 and 124.19(a)(2) – (4); *In re Penneco Envtl. Sols., LLC*, 17 E.A.D. 604, 617-18 (EAB 2018). Issues are deemed to have been preserved for review if the petitioner demonstrates that the issues and arguments raised on appeal were raised previously, either during the public comment period on the draft permit or during a public hearing. 40 C.F.R. § 124.19(a)(4)(ii); *In re Seneca Res. Corp*., 16 E.A.D. 411, 415 (EAB 2014).

III. BACKGROUND

A. Overview of the UIC Program

Congress established the UIC program under the Safe Drinking Water Act, and directed EPA to promulgate regulations for its implementation consistent with the protection of USDWs, 42 U.S.C. § 300h. EPA fulfilled this Congressional mandate by promulgating Title 40, Parts 144 – 148 of the Code of Federal Regulations, which includes minimum requirements for UIC permits that EPA administers and enforces in states, like Pennsylvania, that are not authorized to administer their own UIC programs. 40 C.F.R. §§ 144.11 and 147.1951-147.1955. The purpose of these UIC regulations is to prevent the movement of fluids containing contaminants into USDWs if the presence of those contaminants may cause a violation of primary drinking water regulations or otherwise adversely affect human health. 40 C.F.R. § 144.12(a).

Among the six classes of injection wells permitted under EPA's UIC program, Class II wells are used to inject fluids for three purposes: storage of hydrocarbons, enhanced recovery of oil or natural gas, or disposal of fluids from oil or gas production. 40 C.F.R. § 144.6(b)(1) – (3). The UIC Permit issued to Penneco here is for a Class II well authorizing the injection of fluids "produced solely in association with oil and gas production."

B. Factual Background

On July 23, 2021, Penneco submitted an application for a Class II UIC permit for a facility located in Plum Borough, PA. Petition at 5. Contrary to Petitioners' account of the procedural background, Penneco did not and has not "filed a notice" that the Sedat #4A well is no longer suitable for brine disposal and will be plugged. The form to which Petitioners refer and attach in Attachment 5 is an EPA form that accompanies every Class II UIC permit application to provide for the end of life of the well. It is necessary and appropriate that EPA require such planning for the plugging of UIC wells. In the eventuality that the Sedat #4 is no longer suitable for brine disposal, it will be plugged. The remainder of Attachment 5 to the Petition reflects a process allowed under Pennsylvania law to request an alternate method for well plugging, which is irrelevant to the matter before the Board, as discussed further below.

Following a technical review of the application pursuant to the SDWA and its implementing regulations, EPA determined, upon consideration of the surrounding geology, the well construction, the proposed operation and monitoring of the well, the plugging and abandonment plan, and financial responsibility worksheets submitted, that the application met the regulatory requirements for Class II UIC wells, and if EPA granted the permit, the permit conditions would protect USDWs from endangerment from injection operations. Petition,

Attachment 8.[1] On May 26, 2022, EPA published notice proposing to issue the UIC Permit and soliciting comments and requests for holding a public hearing. Petition at 5. After a 104 day-long public comment period and two separate public hearings, EPA issued the UIC Permit to Penneco on September 21, 2023. Petition, Attachment 1. EPA also issued a Responsiveness Summary to Comments at the same time that provided a detailed explanation of the permit decision and responded to public comments received. Petition, Attachment 6.

IV. ARGUMENT

Petitioners fail to warrant review by this Board because they: (1) do not demonstrate clear error or an abuse of discretion on the part of EPA or reflect an important matter of policy warranting review and (2) advance issues that either are outside the scope of the Board's jurisdiction or were not preserved for review. As an initial matter, there are three new issues to be addressed before proceeding to the arguments regarding issues raised in both the Petitions for Review Docket Nos. 23-01 and 24-02.

First, Dr. Patricia Carr fails to meet the threshold required to file a Petition for Review. The Petition states that she "testified and gave public comment during the public hearing on the draft permit that took place on August 30, 2022." Petition at 3. The record is devoid of such comments. Following review of the hearing transcripts and written comments, Penneco was unable to locate any comments from Dr. Carr, nor has Petitioner provided any evidence of such comments. See April 12, 2024 EPA Response to Petition for Review, Attachments 4, 7, and 8, EAB Docket No. 23-01. Pursuant to 40 C.F.R. § 124.19(a)(2), Dr. Carr has not met the threshold requirement to seek review and her Petition should be denied.

[1] Penneco's Response to the Petition for Review refers to the Petitioners' attachments rather than submitting the same attachments with its Response.

Second, Mr. Matthew Kelso did provide comments to EPA during the permit process but introduces confusion and misstatement of facts related to the Sedat #3A UIC well that Penneco has operated at its facility in Plum Borough, Pennsylvania since 2021. EPA's Responsiveness Summary to Public Comments response to Comment 12 accurately refutes the claims and errors that Petitioners would associate with Penneco's Sedat #3A well. Petition, Attachment 6 at 23-28. To support their arguments, Petitioners allege that the Sedat #3A well operated by Penneco has a history of leaks and that as a result Penneco "has not shown that they can build a well in such a way that it would not contaminate the drinking water." Petition at 44. Petitioners' allegations are incorrect.

Nowhere does the Petition cite a report or other finding from EPA or any other public agency that the #3A well leaked. In 2021, when an increase in the annular pressure was noted, Penneco chose to install an additional string of casing. At no time was there any loss of injectate fluid from the well. Petition, Attachment 6 at 24-25. In fact, at all times, Penneco has operated the #3A well within the permitted parameters. Penneco simply paused operations to reconfigure the well for optimum structural integrity. Additional investigations by EPA and PADEP in response to complaints relating to water supply contamination likewise yielded no determination of any leaks from #3A. *Id*. In June 2023, an EPA inspector visited the #3A site to witness a Mechanical Integrity Test. No issues with the well were found. *Id*. at 24. In short, Petitioners' allegations are contrary to the facts and should be rejected. Regardless of Petitioners' many errors and omissions, the operation of the Sedat #3A well is irrelevant to the UIC Permit for Sedat #4 that is before the Board.

Third, Petitioners misunderstand and misrepresent their Attachment 5, which is correspondence between Penneco and the Pennsylvania Department of Environmental Protection

("PADEP") about the methods required to plug wells under Pennsylvania regulations. Petition at 14-15. As discussed therein, Penneco withdrew its application for an alternate well plugging method as per PADEP's request. This correspondence is entirely irrelevant to the question before the Board, which is limited to whether the Petition for Review warrants review.

Further, Petitioners attempt to create an issue related to PADEP's requirement for a state level permit for UIC wells in Pennsylvania. *Id*. Under the authority of the Pennsylvania Oil and Gas Act, 58 Pa. C.S. §§ 3201 et seq., and PADEP has created a process to follow issuance of EPA's UIC Class II permits.[2] EPA does not have the authority and has not created a process that would require PADEP's well conversion permit before issuance of a federal UIC Class II Permit. Petitioner fails to make any relevant legal issue of the sequence that PADEP follows to authorize UIC Class II wells in Pennsylvania.

A. Petitioners fail to demonstrate grounds warranting this Board's sparing review.

Excluding issues that fall outside this Board's jurisdiction or that were not preserved for review discussed further below, Petitioners' arguments against issuance of the UIC Permit can be separated into three categories. Petitioners argue first that EPA's statutory or regulatory authority to permit injection of fluids associated with conventional oil or natural gas production does not encompass the injection of fluids associated with hydraulic fracturing activities. Petitioners also

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[2] 25 Pa. Code § 78.18 states:
"(a) A person may not drill a disposal or enhanced recovery well or alter an existing well to be a disposal or enhanced recovery well unless the person:
(1) Obtains a well permit under § 78.11 (relating to permit requirements).
(2) Submits with the well permit application a copy of **the well permit, approved permit application and required related documentation submitted for the disposal or enhanced recovery well to the EPA under 40 CFR Part 146** (relating to underground injection control program). . . ." (bold emphasis added).

argue that EPA lacked sufficient information about the fluids proposed for injection to ensure well integrity and, moreover, failed to apply conditions from Class I injection wells for the disposal of hazardous waste. Petitioners argue in conclusion that EPA did not adequately respond to public comments raising environmental justice concerns. Each of these arguments fails for the reasons discussed below.

1. The SDWA and its implementing regulations authorize the injection of fluids associated with hydraulic fracturing activities.

Petitioners allege that EPA violated the SDWA in issuing the UIC Permit because it allows for the disposal at the permitted well of fluids associated with hydraulic fracturing activities. Petition at 8-13. Neither the SDWA nor its implementing regulations contain any such prohibition. The SDWA defines "underground injection" as encompassing the "subsurface emplacement of fluids by well injection" except for "the underground injection of natural gas for purposes of storage" and "the underground injection of fluids or propping agents pursuant to hydraulic fracturing operations related to oil, gas, or geothermal production activities." 42 U.S.C. § 300h(d)(1). The exception for hydraulic fracturing, which was introduced with the 2005 Energy Policy Act, P.L. 109-58, removed hydraulic fracturing from UIC permitting obligations under the SDWA—not, as Petitioners contend, to make the underground injection of hydraulic fracturing fluids in Class II wells unlawful.

In the absence of a prohibition on injection fluids associated with hydraulic fracturing activities, Petitioners attempt to engraft one onto the SDWA by equating hydraulic fracturing activities with "unconventional" oil and gas activities. *See* Petition at 9 ("there are differences between conventional wells and unconventional ('fracked') wells … the latter involves fracking in 'unconventional' low-permeability formations"); Petition at 12 ("the Region fully understood

that the 'fluids' authorized to be disposed of are from 'fracking' and 'hydraulic fracturing'; this violates the SDWA"). Drawing upon an erroneous equivalency between hydraulic fracturing and unconventional gas development, Petitioners contend that the acceptance of fluids from hydraulic fracturing operations is inconsistent with 40 C.F.R. § 144.6(b), which provides that Class II wells are wells which "inject fluids … which are brought to the surface in connection with . . . conventional oil or natural gas production . . . ." Petitioners' focus on hydraulic fracturing, however, is misplaced; both conventional and unconventional wells, as defined under Pennsylvania law, conduct hydraulic fracturing activities.

Though the terms "conventional" and "unconventional" are not defined in the SDWA or its implementing regulations, the regulatory history supports EPA's implementation of its regulations. As originally proposed in 1976, the UIC regulations included a Subpart D ("Requirements Applicable to Injection Wells Related to Oil and Gas Production"), which would apply to "underground injection of brine or other fluids which are brought to the surface in connection with oil and natural gas production." 41 Fed. Reg. 36730, 36742 (August 31, 1976). A subsequent proposal introduced the concept of different classes of UIC wells, including Class II wells that would include fluids "brought to the surface in connection with conventional oil or natural gas production…." 46 Fed. Reg. 48243, 48250 (Oct. 1, 1981). Nothing in this subsequent proposal suggests that EPA's use of the term "conventional" was intended to *narrow* the scope of fluids that would be covered as compared to the originally proposed Subpart D, which broadly would have included brine or any other fluids brought to the surface in connection with oil and natural gas production. Indeed, in adopting this subsequent proposal, EPA explained that its intent

was to *broaden* the scope of wells that would be covered under Class II as compared to the originally proposed Subpart D. *Id*. at 48245.[3]

The use of the terms conventional and unconventional with respect to natural gas formations are relatively recent given advances in horizontal directional drilling technologies that allowed for the efficient extraction of gas from shale and tight formations since the early 2000's. When the relevant regulations were adopted and amended in the 1970's and 1980's, the terms conventional and unconventional were not in use as distinct types of wells and cannot now be interpreted to preclude the injection of waste from the production of gas from unconventional formations in Class II UIC wells. The most likely meaning of the word "conventional" used in the regulations is the ordinary and plain meaning of the word, which is "commonplace," "ordinary," and "based on convention."[4] As noted in Region 3's Response to the Petition for Review, hydraulic fracturing was introduced in the late 1940's and is used for the production of gas from both conventional and unconventional formations. Region 3 Response at 31. Petitioners attempt to distinguish oil and gas wastewater based on the use of hydraulic fracturing has no significance to the validity of the UIC Permit for Sedat #4.

Moreover, Petitioners ignore the import of the 2005 amendments to the SDWA as part of the Energy Policy Act. Under those amendments, Congress made a categorical determination that fluids injected for hydraulic fracturing operations do not constitute "underground injection" subject to regulation under the UIC program. It would be nonsensical to conclude that Congress

[3] Specifically, EPA sought to expand Class II to include disposal of waste waters from gas plants, which EPA found to be "an integral part of the production of gas from oil and gas fields ... along with produced brines, so long as these waste waters are not a hazardous waste at the time of injection."

[4] "Conventional." Merriam-Webster, https://www.merriam-webster.com/dictionary/conventional (accessed 2 May. 2024).

nonetheless intended to prohibit the disposal by injection of those fluids once they returned to the surface. Petitioners' contention that the SDWA prohibits the disposal of hydraulic fracturing fluids from oil and gas operations finds no basis in the text of the SDWA and ignores the purpose and history of Class II UIC wells.

As further evidence that EPA's regulation of wastewater from unconventional gas formations includes injection of such wastewater in Class II UIC wells, a 2016 final rule under the Federal Water Pollution Control Act, known as the Clean Water Act, 33 U.S.C. 1251 et seq., establishing pretreatment standards for unconventional gas wastewater refers repeatedly to the current and lawful management of such waste by injection in Class II UIC wells. 81 Fed. Reg. 41845 (June 28, 2016).[5] In setting effluent limitation guidelines and standards for the unconventional gas industry, EPA concluded that zero discharge of pollutants to waters of the U.S. was appropriate based in part on the "availability and economic practicability of underground injection technologies. . . ." 81 Fed. Reg. at 41847.

Petitioners fail to demonstrate that this UIC Permit allowing fluids produced solely in association with oil and gas production is in violation of the SDWA or its implementing regulations because it will allow for the disposal of waste from hydraulically fractured gas formations. Within the final Permit, EPA established the necessary conditions to prevent the injection operations from endangering USDWs. Most fundamentally, the Permit prohibits allowing underground injection activity "to cause or contribute to the movement of fluid containing any contaminant(s) into any [USDWs], if the presence of any such contaminant may cause a violation of any primary drinking

[5] *See* 81 Fed. Reg. 41845 (June 28, 2016) generally, and 81 Fed. Reg. 41848 where EPA states that unconventional gas "extraction wastewater is typically managed through disposal via underground injection wells, reuse/recycle in subsequent fracturing jobs, or transfer to a centralized waste treatment (CWT) facility (see 80 Fed. Reg. 18570, April 7, 2015)."

water regulation under 40 C.F.R. Part 141 or if it may otherwise adversely affect the health of any persons." Petition, Attachment 1 at p. 2. The Permit is protective for all injected wastewaters.

2. The UIC Permit conditions are protective of the environment.

Petitioners argue that the UIC Permit is not protective of the environment because EPA lacked sufficient information about the nature of the fluids proposed for injection to verify well design and integrity and, moreover, failed to impose permit conditions for hazardous waste disposal from Class I injection wells. Both contentions are meritless for the reasons discussed below.

i. EPA had sufficient information to verify well design and integrity, and imposed appropriate permit conditions.

Petitioners repeatedly argue that, because EPA is allegedly "unaware of the true nature of the 'fluids' that will be disposed of in the Injection Well, nor has the Region presented any information regarding the chemical compatibility of the resulting mixture," its issuance of the UIC Permit is an abuse of discretion or otherwise clearly erroneous because it "cannot credibly state that the design and integrity of the Injection Well is sufficient." Petition at 12, 39. But this is a non sequitur.

The UIC Permit includes several requirements to verify design and integrity independent of the nature of the injected fluids, including continuous monitoring of surface injection pressure, annular pressure, flow rate, and cumulative volume in the injection well. Petition, Attachment 1 at 7. The well is required to be equipped with automatic shut-off devices that would activate in the event of a mechanical integrity failure. *Id*. There are also periodic sampling and analysis requirements for the composition of the injection fluid encompassing several parameters, including (but not limited to) pH, specific gravity, specific conductance, chloride, total organic carbon, total

dissolved solids, hydrogen sulfide, alkalinity, and hardness.[6] *Id*. Penneco is also required to maintain a record of every load of injection fluid received, including where the load was obtained and the volume and specific gravity. *Id*. at 7-8.

The UIC Permit also establishes several construction and operating requirements, including, but not limited to, restriction to injection into formations separated from USDWs by confining zones, and free of unknown open faults or fractures within a 0.25 mile radius, casing and cementing standards at various depths below ground surface, demonstration of mechanical integrity through initial and periodic testing, and a maximum allowable injection pressure limitation. *Id*. at 12-14.

Taken together, these conditions have been found by the Board to be acceptable restrictions that address concerns over the composition of fluid to be injected or the performance of the well. *See Jordan Dev. Co*., 18 E.A.D. at 24 (dismissing a petition raising concerns regarding the composition of fluid authorized to be injected under a UIC permit, finding that ongoing annual sampling and analysis requirements for injection fluids did not constitute clear error or an abuse of discretion).

Moreover, Petitioners attempt to demonstrate that such conditions were inadequate by citing to Penneco's submittal in provided in Petitioners' Attachment 5, which is erroneously characterized as an admission that the Sedat #4A well was not suitable injection. Petition at 6. As explained above, Petitioners misconstrue the meaning of this document, which merely reflects a

[6] In its August 2022 comments, Protect PT faulted the Pennsylvania Department of Environmental Protection ("PADEP") for not having tested total dissolved solids in connection with an alleged failure of a separate UIC well, which it identified as a parameter "that typically indicate injection fluid infiltration" to groundwater supplies. This UIC Permit specifically requires monitoring of total dissolved solids for the injection fluid.

prospective planning for plugging in the event that the well becomes unsuitable in the future, and not that it currently is unsuitable.

The Petitioners have failed to establish that EPA's issuance of the UIC Permit constituted clear error or an abuse of discretion.

ii. EPA was not required to impose permit conditions associated with UIC Class I wells.

The Petitioners repeatedly characterize the fluids proposed to be injected under the UIC Permit as "hazardous waste" and contend that, as a result, the requirements associated with Class I wells must apply. *See, e.g.*, Petition at 33, 41. Petitioners choose to ignore the fact that fluids associated with oil and gas operations categorically are excluded from the definition of hazardous waste under the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.* ("RCRA")[7] In its 2019 regulatory determination, EPA concluded that revisions to the federal regulation for the management of wastes associated with oil and natural gas under Subtitle D of RCRA is not necessary.[8] EPA therefore is neither required nor permitted to impose Class I UIC well requirements for disposal of fluids associated with oil and gas activities.

[7] The text of RCRA directed EPA to determine whether regulations governing hazardous waste were warranted for drilling fluids, produced waters, and other wastes associated with the exploration, development, or production of crude oil or natural gas. 42 U.S.C. § 6921(b)(2)(B). EPA determined in 1988 that regulation of such materials as hazardous waste was not warranted. 53 Fed. Reg. 25447 (July 6, 1988).

[8] EPA, "Management of Oil and Gas Exploration, Development and Production Wastes: Factors Informing a Decision on the Need for Regulatory Action," April 2019 (available at www.epa.gov/sites/production/files/2019-04/documents/management_of_exploration_development_and_production_wastes_4-23-19.pdf) at p. 9-4 ("Based on the information gathered for this review, EPA concludes that revisions to the federal regulations for the management of E&P wastes under Subtitle D of RCRA (40 CFR Part 257) are not necessary at this time").

3. EPA followed the required process and appropriately responded to comments.

Petitioners claim that "the EPA violated its own Environmental Justice Policy by using the "Halliburton Loophole" to provide Petitioners, Plum residents, and Pennsylvania's environment with fewer environmental protections just because this project involves oil and gas operations," and that "[f]or the EPA's EJ Policy to have any meaning, the SDWA should apply in this matter, and in all permit appeals under [Part] 124 in order to guarantee the fair treatment of people, regardless of geography." Petition at 48-49. The Petition contends that EPA erred in not imposing additional conditions, which the Petition does not specify, based on consideration of various factors such as disproportionate reliance on groundwater, and cumulative health impacts from multiple sources of toxicity. *Id*. at 51. Vague accusations regarding unspecified conditions fail to present an issue for review by this Board.

Moreover, although the Petition refers to a "EJ Policy," it fails to cite what exactly this policy is, or which specific provision of it was purportedly violated by EPA. To the extent Petitioners are referring to Executive Order 12898, 59 Fed. Reg. 7629 (February 16, 1994), the Board has previously held that this Order's impact on UIC permitting is limited, given that the EPA "has no authority to deny or condition a permit where the permittee has demonstrated full compliance with the statutory and regulatory requirements." *Envotech*, 6 E.A.D. at 280. The Board has recognized that there are two areas in which the EPA has discretion to implement Executive Order 12898: (1) providing early and ongoing opportunities for public participation in cases where underground injection may pose a disproportionately adverse effect on the drinking water of a minority or low-income population, and (2) establishment on a case-by-case basis of permit conditions necessary to prevent migration of fluids into USDWs, regardless of the

composition of the community surrounding the proposed injection site (referred to as EPA's "omnibus authority" under 40 C.F.R. § 144.52(a)(9)). *Id*. at 281.

In *Envotech*, the Board held that EPA's holding of a two-day informal hearing to ensure the views of the communities surrounding the sites were received, as well as EPA's determination that the impact of the proposed well would be minimal on minority or low-income populations, were a reasonable implementation of Executive Order 12898. In this case, EPA held not one, but two separate public hearings, one virtual and one in the municipality in which the permitted well is proposed. Moreover, EPA extended the period for public comments to provide for over 100 days in total for comments to be submitted. It did so even despite the fact that based on its environmental justice screening, it did not find substantial potential impacts on minority or low-income populations in the area.

Recent Executive Orders, including Executive Order 13990, 86 Fed. Reg. 7037 (Jan. 20, 2021) and Executive Order 14008, 86 Fed. Reg. 7619 (Feb. 1, 2021) do not include any express terms that change or add factors for review as part of environmental justice consideration by EPA.[9]

The Petitioners do not rebut nor provide any information indicating that EPA's determination that the area did not contain appreciable minority or low-income populations was clearly erroneous. Instead, Petitioners merely contend that EPA should have considered other demographic categories in determining whether environmental justice concerns existed, while

[9] Executive Order 14008, Section 221 provides for the establishment of the White House Environmental Justice Advisory Council. The appointment of members to the committee are instructed to include those with knowledge on specific categories of topics, including "racial inequity." The Order also references addressing "underserved communities." However, there is no explicit mention in this Order or Executive Order 13990 of any of the categories suggested by Petitioner, such as "disproportionate reliance on groundwater" or "cumulative health impacts from multiple sources of toxicity." Straining the language of these Orders to require the considerations proposed by Petitioners should be rejected.

failing to cite to any "EJ Policy" that directs EPA to make such considerations. The EPA's actions to address environmental justice in this case were appropriate, in line with the Board's holdings in *Envotech* and *Jordan*, 18 E.A.D. at 14.

B. Petitioners seek review of issues that the Board does not otherwise have jurisdiction to review.

The UIC program authorizes the Board to review UIC permitting decisions only to the extent those decisions affect compliance with SDWA and applicable UIC regulations. Accordingly, the Board has limited jurisdiction to consider issues in a UIC permit appeal. Board precedent makes "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 USDWs, and no farther." *Envtl. Disposal Sys.*, 12 E.A.D. at 266; *Jordan Dev. Co.*, 18 E.A.D. at 26. In particular, the UIC regulations at 40 C.F.R. § 146.24(a) and (b) respectively specify which factors EPA must consider, as well as additional factors that EPA may consider, in evaluating a UIC permit application.

None of these factors encompasses consideration of state law. Claims that EPA or the permittee has not complied with certain state laws are beyond the scope of the federal UIC program and the Board has no jurisdiction to address such issues. *Envotech*, 6 E.A.D. at 275 (finding that the issue of compliance with remediation and surface facility regulations under state law are "vested in the State and does not fall within the ambit of the UIC program" and are beyond the scope of jurisdiction of the Board).

1. Consideration of Pennsylvania laws, including the Environmental Rights Amendment and the Clean Streams Law, is outside the scope of both EPA's UIC permitting authority and the Board's jurisdiction.

As noted above, EPA administers the SDWA's UIC program in Pennsylvania. 40 C.F.R. §§ 144.1(e) and 147.1951 - 147.1955. The Commonwealth of Pennsylvania and its constituent agencies do not have authority to administer the SDWA's UIC program in Pennsylvania. Although the Commonwealth can and does require the Permittee to obtain a separate well permit under state law, the Board has no jurisdiction to review those permitting decisions or associated state laws.

Petitioners nonetheless claim that the issuance of the Permit violated Article I, Section 27 of the Pennsylvania Constitution (the "Environmental Rights Amendment", or "ERA") as well as Pennsylvania's Clean Streams Law, 35 P.S.§§ 691.1-1001.1. Petition at 15-38, 45-47. There is nothing in the SDWA or EPA's UIC regulations that requires EPA to comply with the laws of a state that does not have primacy to administer its own UIC program when issuing a UIC permit. Petitioners' argument that EPA bears, among other things, a "fiduciary duty" of "loyalty," "impartiality," and "prudence" as "trustee" pursuant to the ERA fails because there is nothing that makes these duties applicable to EPA in administering the UIC program. Petitioners have cited not a single case or regulatory provision that otherwise concludes that the ERA or, more generally, state laws, are made applicable to UIC permits issued by EPA in states in which EPA has primacy over the UIC program.

Even assuming, for the sake of argument, that the Board could consider the ERA as part of determining whether to grant review of the UIC Permit, EPA met all applicable standards. Numerous UIC Permit conditions and requirements culminate in the ultimate prohibition against causing or contributing to "the movement of fluid containing any contaminant(s) into any [USDWs], if the presence of any such contaminant may cause a violation of any primary drinking

water regulation under 40 C.F.R. Part 141 or if it may otherwise adversely affect the health of any persons." Petition, Attachment 1 at p. 2. The Petition does not address how these specific UIC Permit conditions or the Permit as a whole fail to properly protect USDWs.

Petitioners' claim that the issuance of the UIC Permit would violate the Pennsylvania Clean Streams Law is similarly outside of EPA's and this Board's review. There is nothing in the SDWA nor 40 C.F.R. § 146.24 that requires or even allows EPA to consider state laws in determining whether to issue a UIC permit when EPA has primacy over the UIC program in that state (as it does in Pennsylvania). Petitioners point to no authority to the contrary, and cursorily state that "EPA cannot choose which laws to follow, nor can it choose which rights it thinks [are] worthy of constitutional protection." Petition at 47. Petitioners are right on that point—EPA is bound strictly to follow the SDWA and the considerations at 40 C.F.R. § 146.24 for its UIC permit decisions. Anything beyond that scope is outside its UIC permitting authority and outside the bounds of the Board's jurisdiction.

2. Petitioners seek review of issues that were not preserved for Board review, or otherwise rely on materials that are not part of the administrative record.

For the Board to review issues raised in the Petition, Petitioners must demonstrate, by providing specific citation to the administrative record, including the document name and page number, that each issue being raised in the petition was raised during the public comment period as required by 40 C.F.R. § 124.13. Issues raised in a petition that were not raised previously can only be considered by the Board to the extent that a petitioner explains why such issues were not otherwise required to be provided during the public comment period under Section 124.13. This requirement is not "an arbitrary hurdle, placed in the path of potential petitioners simply to make the process of review more difficult; rather, it serves an important function related to the efficiency

and integrity of the overall administrative scheme." *In re BP Cherry Point*, 12 E.A.D. 209, 219 (EAB 2005).

It is not enough for a petitioner to point to a comment raised in the record that superficially or tangentially relates to an issue raised on appeal, to satisfy the preservation requirement. The specific substance of the issue raised in the petition must have also been raised during the comment period for it to be preserved. *See In re Jordan Dev. Co., LLC*, 18 E.A.D. 1 (EAB 2019) (finding that a claim that EPA should have considered certain additional demographic and other factors as part of its environmental justice screen in deciding to issue a UIC permit was not preserved for review because the petitioner failed to identify any such comment during the public comment process, although there were general comments regarding environmental justice raised and addressed by EPA in the response-to-comments). Here, the Petition raises issues that were not properly raised during the public comment period for the UIC Permit.

First, the Petition contends, as addressed above, that the UIC Permit violated the SDWA because, under its reading, the acceptance of fluids from hydraulic fracturing operations would fall outside the scope of those oil and gas activities identified at 40 C.F.R. § 144.6(b)(1). Petition at 8-12. Although the Petition faults EPA for not addressing this argument in its Responsiveness Summary, *id*. at 12, this argument in fact was never raised during public comment. Nor did Petitioners provide any citation to the administrative record showing that it was raised. Although EPA responded to comments contending generally that the Permit would violate the SDWA regulations, such comments did not raise the specific issue now raised in the Petition regarding 40 C.F.R. § 144.6(b)(1). Even if considered by the Board, this argument fails as explained above.

Second, the Petition argues that the 2005 Energy Policy Act's exclusion of disposal of fluids from hydraulic fracturing operations from the definition of "underground injection" violates

Pennsylvania law. Petition at 38-42. This argument was never raised during public comment and Petitioners did not provide any citation to the administrative record showing that it was raised. Even if considered by the Board, this argument fails because the validity of the 2005 act is not before the Board.

Third, the Petition contends that EPA should have considered additional demographic factors apart from those relied upon in performing its EJ Screening to determine whether additional case-by-case permit conditions should be imposed. Petition at 51. The specific additional EJ factors for EPA to consider were not raised during public comment and Petitioners did not provide any citation to the administrative record showing they were raised.

Each of these issues was reasonably ascertainable during the extensive public comment period. They involve regulations or policies that existed unchanged during the pendency of the public comment period and beyond. They were therefore not preserved for review by the Board, and the Board should not consider them. In addition, the various attachments to the Petition that are cited by the Petitioners as support for their argument on these issues that were not preserved for review were not part of the administrative record and should also not be considered.[10]

3. The issuance of the Permit does not violate the Clean Water Act ("CWA").

The UIC program is authorized pursuant to the SDWA. Nonetheless, Petitioners cite to the recent Supreme Court case *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 590 U.S. ___ (2020), which held that a National Pollutant Discharge Elimination System ("NPDES") permit

[10] See, e.g., *In re Windfall Oil & Gas*, 18 E.A.D. 411, 423 ("The petition now before us fails to identify any factual or legal basis or new information in the administrative record for this Permit that would cause us to reconsider the analysis ..."); *Penneco Envtl. Sols.*, 17 E.A.B. at 615, n. 7 (finding that documents cited in support of petitioner's argument that were not demonstrated to be submitted in response to new materials the Region added to the record as part of its response to comments were outside of the administrative record).

under the CWA would be required for a discharge of pollutants from a point source that flows through groundwater before reaching a water of the United States, where such discharge is the "functional equivalent" of a "direct discharge." The Court identified that certain factors regarding the discharge are to be considered in determining whether it constitutes the functional equivalent of a direct discharge, including the transit time and the distance traveled. *Id*. at 1476. This issue is irrelevant to the permit before the Board, which was issued under the SDWA, not the CWA.

Moreover, the point stressed by Petitioners in support of their position is that an alleged history of releases from Penneco's #3A well establishes that discharges to surface waters may occur notwithstanding EPA's findings. As discussed earlier and further below, Petitioners' allegations are factually erroneous, but even taking their allegations at face value, the Petition fails to allege any actual instances of discharge to waters of the U.S. or any other surface waters. Instead, Petitioners merely offer a cursory statement that "residents might expect that [such discharges] will in fact affect surface waters." Petition at 45. The CWA does not apply based on speculation—rather, there must be a clear and identifiable direct discharge, or its functional equivalent, to surface waters. Here, there is no such discharge that has been identified and the issuance of the Permit does not violate the CWA.

V. CONCLUSION

EPA's UIC Permit decision was not based on clearly erroneous findings of fact or law and did not constitute an abuse of discretion. Petitioners have failed to carry their burden to warrant review of EPA's issuance of the UIC Permit. Much of the Petition's arguments are otherwise outside of the scope of the Board's review. The Board should deny the Petition for Review.

VI. STATEMENT OF COMPLIANCE WITH THE WORD LIMITATION

In accordance with 40 C.F.R. § 124.19(d)(1)(iv) and (d)(3), Penneco certifies that this Response to Petition for Review does not exceed 14,000 words.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by e-mail this 8th day of May 2024, upon the persons listed below:

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