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 Permit No. PAS2D702BALL	UIC Appeal No.: UIC 24-02

OMNIBUS REPLY BRIEF OF PETITIONERS DR. PATRICIA B. CARR AND MR. MATTHEW KELSO TO THE RESPONSE BRIEFS OF THE REGION AND PENNECO ENVIRONMENTAL SOLUTIONS, LLC

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I. SUMMARY

Pursuant to 40 C.F.R. § 124.19(c)(2), Dr. Patricia B. Carr and Mr. Matthew Kelso (together, "Petitioners") hereby file this Omnibus Reply to the Responses of the Region filed on May 9, 2024 ("Region Response") and Penneco Environmental Solutions, LLC filed on May 8, 2024 ("Penneco Response)" and together with the Region Response, "Responses"). The Responses fails to rebut Petitioners' showing that the Region's issuance of the Permit was (1) based on clearly erroneous findings of fact and conclusions of law, (2) an abuse of discretion, and (3) implicate important policy considerations.

The Responses fail to recognize that the Board, when construing a regulation, relies on the plain language of the regulation, and instead, they provide their own erroneous construction of the SDWA. The Region also admits that the EPA has shaped its own policy in issuing similar permits across the country rather in violation of the SDWA. The Responses also fail to recognize the fact that the Region specifically responded to comments regarding the Region's consideration of Pennsylvania's Clean Streams Law and the Environmental Rights Amendment, which is enshrined in the Pennsylvania Constitution. Because the Region included these considerations in its review, and because they were relied upon by the pubic, make such considerations squarely within the Board's jurisdiction. Finally, the Responses attempt to limit the reach of the EPA's Environmental Justice Policy ("EJ Policy"), which implicates important policy considerations.

Petitioners have met their burden not only to allow this Honorable Board to review the Permit, but also persuasively argue in favor of the ultimate rescission of the Permit given the Region's clear errors of law, abuses of discretion, and the implication of important policy considerations that present real harm to the environment and human health.

II. ARGUMENT

A. The Region's Violation of the SDWA is both an Error of Law and Implicates Important Policy Considerations

As set forth in the Petition, the Region violated the SDWA because the Permit allows Penneco to inject fluids from unconventional oil and gas operations in violation of 40 C.F.R. § 144.6(b). This is both an error of law and an important policy consideration because the EPA developed an improper policy allowing it to issue permits in violation of 40 C.F.R. § 144.6(b). *See infra.*

The Region's issuance of the Permit clearly violates the plain language of 40 C.F.R. § 144.6(b), which limits the fluids to be injected to conventional oil or gas production, regardless of the method used to generate such fluids. Notably, while both the Region and Penneco argue that the Board's jurisdiction is limited to the Safe Drinking Act and UIC permitting regulations in other sections of their Responses, they each improperly ask the Board to expand its jurisdiction to broaden the regulation to provide cover for the improper issuance of the Permit that allows the injection of fluids

from unconventional oil or gas production.[1] Further, the Region's Response identifying its flawed interpretation of 40 C.F.R. § 144.6(b), through which it has developed a policy to issue similar permits throughout the country, implicates an important policy consideration. *Id.* The EPA's issuance of similar permits across the country that allow the injection of unconventional fluids into Class II wells were improperly issued and the Region cannot use the agency's improper prior permit issuances as evidence of the propriety of the issuance of *this* Permit.

Penneco and the Region are correct with respect to the fact that 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. *Id.* 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.'"[2] The arguments of the Region and Penneco that the Board should look beyond the SDWA and applicable UIC regulations to broaden the scope of the plain language of 40 C.F.R. § 144.6(b) is without merit and outside of the Board's jurisdiction. *Id.*

The Responses also bolster Petitioners' argument that if unconventional fluids were to be permitted in Class II wells, the plain language of 40 C.F.R. § 144.6(b) would

[1] Region Response at 25-41; Penneco Response at 8-12.
[2] Penneco Response at 17.

so state. Both the Region and Penneco make it clear that the legislative history of the UIC regulations was *prior* to the advent of hydraulic fracturing in unconventional wells, namely 1976 and 1981. *Id.* Moreover, 40 C.F.R. § 144.6(b) *does not implicate the method* by which the fluids to be injected are generated, but it clearly only provides for the injection of fluids from *conventional* oil or gas operations. *Id.*

Fatal to the arguments of the Region and Penneco is the Region's admission that "EPA's rule and the regulatory history for the rule defining Class II wells do not provide a meaning for 'conventional oil and natural gas production' and, as a result, the precise contours of the phrase to newer types of hydraulic fracturing is unclear."[3] There is nothing unclear about 40 C.F.R. § 144.6(b), and the machinations that Penneco and the Region perform in their analyses are outside the scope of the Board's review, and moreover, buttress the fact that if legislators meant to include "unconventional" fluids for injection, they would have done so.

The Region's admission that it "developed and consistently applied a broad but reasonable interpretation of the ambiguous phrase 'conventional oil or natural gas production…'" is a policy decision by the EPA.[4] The EPA is not permitted to expand the scope of a regulation, particularly when the language of a regulation is unambiguous and clear, in its issuance of Permits. Further, the Board's jurisdiction and authority do not permit it to broaden the scope of a regulation to shoehorn the Region's unlawful

[3] Region Response at 28.
[4] *Id.*

issuance of the Permit in clear violation of the plain language of 40 C.F.R. § 144.6(b).

The Responses' arguments that the legislative history does not "narrow" the scope of fluids or specifically prohibit the injection of fluids from unconventional oil or gas operations is misplaced. At the time of the enactment of 40 C.F.R. § 144.6(b), the existence of fluids from unconventional wells did not exist, but more importantly, nothing in the regulation or legislative history gave the EPA the discretion, or confers authority to the Board, to add a different class of fluids in the UIC permitting scheme.

Penneco provides an example of a different set of regulations that distinguish between conventional and unconventional gas wastewater, and the Region generally references, the Clean Water Act.[5] The Clean Water Act's reference to the "availability and economic practicability of underground injection technologies" with respect to wastewater from unconventional oil or gas production does not create a regulation that permits fluids from unconventional oil or gas production be injected into Class II wells. The fact that there was a distinction made in an update to the Clean Water Act in 2016, but not the UIC permitting regulations, places it out of reach to the Board and means that had legislators wanted to include fluids from unconventional oil or gas production in UIC permitting for Class II wells, they would have.

The Region admits that the scope of the definition of "conventional oil or natural gas production" is not clear from the UIC regulations or the *relevant* regulatory history.[6]

[5] Penneco Response at 11.
[6] Region Response at 26.

The Region's argument that the statute "groups the wastewater from *all* oil and natural gas production into a Class II is not a proper reading of the regulation, which clearly identifies only fluids from conventional oil or gas production as suitable for injection.[7] The Region's Response makes it clear that the EPA has been aware of the gap in UIC permitting with respect to injecting fluids from unconventional oil or gas production in Class II wells. To Petitioners' knowledge, the EPA has not sought to have the UIC permitting regulations amended to include fluids from unconventional oil or gas operations. The fact that the EPA has issued improper permits throughout the country under its own interpretations and policies is a problem that the EPA created, and such unlawful behavior cannot be used to "grandfather" the Permit or any future permits that are issued under the EPA's improper interpretation and policy.

B. The Region Abused its Discretion when it Issued the Permit

1. The UIC Permit Conditions are not Protective of the Environment

Penneco and the Region argue that the Permit conditions are protective of the environment. Petitioners acknowledge that the Notice refers to Penneco's obligation to plug the well at a future date if the well is determined not to be suitable for brine injection, and therefore Petitioners withdraw their claim regarding the Notice.

However, perhaps one of the most disingenuous arguments that the oil and gas industry makes, and that Penneco makes here, is that the wastewater produced by oil

[7] Region Response at 26.

and gas operations are excluded from the definition of hazardous waste under the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.*, ("RCRA") and therefore need not be handled as hazardous waste. The Region's Response makes it clear that the fluids to be injected may be "toxic, hazardous, or radioactive."[8] Such admission underscores the need for permit conditions that identify and monitor all sources and ensure mechanical integrity for such fluids, otherwise, neither the Region nor Penneco can credibly state that the mechanical integrity of the Injection Well is sufficiently protective.

The fact that oil and gas wastewater is exempted from RCRA does not make that waste any less toxic, hazardous, and radioactive, nor does it prohibit the Region from imposing common sense conditions to the same type of waste regardless of its source. Penneco's argument that the Region is not *required* to impose Class I UIC well requirements for disposal of fluids associated with oil and gas activities is correct, however, the Region is entitled to use its discretion to include permit conditions and should have done so here to mirror the protections for true nature of the waste, whether under the regulations for Class I wells, Class IV, Class V, or otherwise.[9] The Region cannot shift the burden to identify appropriate permit conditions to the public by ignoring its obligation based upon whether or not the Comments proposed technical permit conditions.

[8] Region Response at 47.
[9] 40 C.F.R. § 144.52(a)(9)

2. The Region's Failure to Consider Penneco's Compliance History was an Abuse of Discretion and Implicates Important Policy Considerations.

The Region and Penneco claim that the Permit conditions ensure protection of the environment and human health. This argument may be persuasive (a) if the Region complied with 40 C.F.R. § 144.6(b) (*see supra*) and (b) if Penneco hadn't already had issues related to the Sedat #3A injection well, regardless of whether the EPA or Penneco agree that these were violations or if the issues impacted surrounding drinking water.[10] Given Penneco's track record, it simply cannot be trusted with another permit for an injection well. Penneco argues that the Board's previous determinations that a permittee's compliance history, in and of itself, is not "necessarily relevant" to a permit issue's decision to issue a UIC permit, and that "generalized concerns regarding past violations do not, without more, establish a link to a 'condition' of the present permit modification, and thus do not provide a jurisdictional basis for the Board to review."

Penneco's noncompliance with state environmental laws is highly relevant to whether the Region should have issued the Permit to Penneco.[11] The injection of oil and gas fluids into an injection well is a highly technical endeavor, and Penneco has demonstrated either its inability or unwillingness to comply with the law, which presents a higher risk of harm to the environment and human health.

[10] RTC at 25.
[11] Petition at 21, Att. 15.

3. The Region's Failure to Consider Environmental Justice Factors was an Abuse of Discretion and Implicates Important Policy Considerations.

The attempts of both the Region and Penneco to limit the EJ Policy to minority or low-income populations, who in fact are disproportionately harmed and burdened with cumulative impacts of many sources of environmental harms, are misguided and incorrect because the EJ Policy extends to *all people*.[12] Petitioners note that Penneco and the Region each included an executive order in the Responses, and as such, Petitioners inclusion of other applicable executive orders are not "new issues" that Petitioners raise in this reply brief. While the term "environmental justice" has not yet been defined by Congress or by EPA in its regulations, the Petition sets forth the published policy statement by the EPA, *which incorporates each of the cited Executive Orders*:

> "Environmental justice" means the just treatment and meaningful involvement of ***all people***, regardless of income, race, color, national origin, Tribal affiliation, or disability, in agency decision-making and other Federal activities that affect human health and the environment so that people: (1) are fully protected from disproportionate and adverse human health and environmental effects (including risks) and hazards, including those related to climate change, the cumulative impacts of environmental and other burdens, and the legacy of racism or other structural or systemic barriers; and (2) have equitable access to a healthy, sustainable, and resilient environment in which to live, play, work, learn, grow, worship, and engage in cultural and subsistence practices.

The Region and Penneco are correct in stating that the EJ Policy includes Executive Order 12898, 59 Fed. Reg. 7629 (February 16, 1994), but they omit two other executive

[12] Region Response 41-44; Penneco Response at 11-13.

orders issued by President Biden that shape the policy. In fact, one of the first actions taken by President Biden was to issue E.O. 13990, which included a mandate for federal agencies to advance and prioritize environmental justice.[13] In the White House release, the EO includes the following policy[14]:

> It is therefore the policy of my Administration that the Federal Government should pursue a comprehensive approach to advancing equity for all, including people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality. (emphasis added).

EO 13990 makes it clear that the term "equity" means the consistent and systemic fair, just, and impartial treatment of ***all individuals***. This policy is meaningless if it results in some people receiving less environmental protection than others simply because the real harms that they face are caused by the oil and gas industry and not a different industry that produces the same type of pollution and risks to human health.

President Biden then issued E.O. 14008, which principally concerned climate change but also outlined environmental justice procedures.[15] EO 14008's goals include strengthening clean air and water protections, holding polluters accountable, delivering environmental justice in communities across America, and driving the assessment, disclosure, and mitigation of climate pollution and climate-related risks in every sector of our economy.

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[13] Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis (E.O. 13990), 86 Fed. Reg. 7037 (Jan. 20, 2021).
[14] https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/
[15] Tackling the Climate Crisis at Home and Abroad (E.O. 14008), 86 Fed. Reg 7619 (Feb. 1, 2021).

In addition, the EO 14008 identifies a policy goal "to identify steps through which the United States can promote ending international financing of carbon-intensive fossil fuel-based energy while simultaneously advancing sustainable development and a green recovery." Permitting injection wells for oil and gas operators like Penneco results in an incentive to continue fossil fuel operations, which is contrary to our country's climate goals. Moreover, allowing oil and gas operators to inject mixed hazardous and radioactive oil and gas waste into wells not suited for the type of waste to be injected will degrade any community in which they are placed, advancing their status into a disadvantaged community; the application of regulations to protect the environment should be proactive, not reactive. People in communities flush with oil and gas waste deserve to be treated the same as people in other communities who have more protections under state or federal environmental laws for the same type of waste generated by a different industry.

Prior to the issuance of EO 13990 and EO 14008, decisions by the Board have tended to reject environmental justice claims in permitting decisions, either based on a finding that no environmental impact would occur, e.g., *In re: Shell Offshore Inc.*, 2007 WL 3138040 (EAB 2007), or that no disadvantaged population falls in the impact area, e.g., (*In re: Beckland Group LLC*, 2008 WL4517160 (EAB 2008). However, in *Communities for a Better Environment et al. v. City of Richmond et al.*, a California Court of Appeals upheld a decision finding an oil refinery facility expansion impact analysis inadequate, in part because it failed to consider disproportionate impact on working class communities, CA 125618 (Cal. App. 2010).

Given the new environmental justice policy directives announced since 2021, the Board's review can be broadened to include the equal treatment of all people, regardless of the community they live in. Permitting the Region and Penneco to skirt environmental protections that should be available to all people degrades and minimizes the effectuation of fair and equal treatment envisioned by the EJ Policy.

This necessarily includes the recognition of additional environmental protections that Pennsylvania affords to its residents. The Region, in its response to comments, included analyses regarding the Region's compliance with Pennsylvania's Clean Streams Law and Environmental Rights Amendment, claiming to be in compliance, and thus making them integral to the Region's permitting analysis. Penneco and the Region ask the Board to ignore the fact the Region considered these issues, and thus were important for the Region to consider prior to issuing the Permit. In addition, the arguments Petitioners make with regard to the Region's compliance with Pennsylvania's Clean Streams Law and the Environmental Rights Amendment implicate important policy considerations, including the EJ Policy, when the Region issues permits in violation of more protective state and federal laws and residents who are guaranteed environmental protections under their state constitutions. In addition, an important policy consideration is whether the federal exemptions utilized by the oil and gas industry violate the EPA's Environmental Justice Policy because the resulting permits offer fewer protections under federal environmental statutes to people simply by virtue of their geographic location. The Region should not be permitted to treat Pennsylvanians worse than Pennsylvania

treats its residents by issuing a permit that would be denied under Pennsylvania law.

4. The Region did not Appropriately Respond to Comments.

The Petition is comprehensive in identifying comments applicable to the Petition as well as the Region's responses thereto. While Penneco commends the Region, and the Region commends itself, for holding two public meetings and extending the comment period, they each miss the point that the reason for such "accommodations" was overwhelming community opposition to the Injection Well. The Region cannot simply check the box on public participation while at the same time failing to give credence to the comments that were received in its Permit conditions, including with respect to financial assurances.

The bottom line is that the community does not want the oil and gas industry's toxic, hazardous, and radioactive waste. The Injection Well presents no benefits that flow to the community, only irreparable harms and significant risk to their environment and health. The only benefit that the Injection Well presents is to Penneco for corporate profit. The Region is not in business with the oil and gas industry, and its mission to protect the environment must come before advancing corporate interests.

5. The Issues Identified in the Petition were Raised in the Comments

Penneco and the Region argue that the comments did not identify the Permit's violation of the SDWA by permitting unconventional fluids to be injected. Any argument that the Petition raises legal issues that did not stem from comments provided

at the hearing is nonsensical. There is no requirement that comments include legal analyses of regulations, legal arguments, or legal conclusions, or that commenters provide each and every document related to such comment. The Comments, either directly or indirectly, are the basis for the legal arguments set forth in the Petition, to which Petitioners refer for the appropriate citations to the Comments, and the Region's responses thereto. The Region and Penneco also object to the supporting information that Petitioners included in the attachments for factual support. Respondents' argument that these materials are outside of the Board's review is incorrect as the regulations pertaining to appeals incorporate the requirement that Petitioners include support for their factual assertions.

Moreover, the Region did not include clear direction to the public on how to obtain and review all the administrative materials. Specifically, the public notice the Region issued 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 instruct the public on how to obtain the specific administrative materials or that there materials other than those listed that the Region relied in its review and issuance of the Permit. 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. 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 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. Finally, the Region and Penneco also ignore the fact that the Region itself included materials in its response in support of its factual contentions that are not part of the administrative record.

Both the Region and Penneco argue that Dr. Carr lacks the threshold procedural requirement of standing to bring the Petition.[16] Dr. Carr advised undersigned counsel that she attended the public meeting, signed in on the sign-in sheet, believed she spoke, and she directly received the email from the Region regarding issuance of the Permit. Accordingly, Petitioners argue that Dr. Carr's participation in this matter should proceed.

III. CONCLUSION

WHEREFORE, for the reasons set forth herein and, in the Petition, which is incorporated herein by reference, Petitioners respectfully request that the Board rescind the issuance of the Permit.

[16] Region Response at 8, Penneco Response at 5.

Respectfully submitted,

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May 22, 2024

REQUEST FOR ORAL ARGUMENT

Petitioners, Dr. Patricia B. Carr and Mr. Matthew Kelso, hereby request that the Environmental Appeals Board (EAB) hear oral argument in the above-captioned matter. Oral argument would assist the Board in its deliberations on the issues presented by the case for the following reasons: This case presents issues important to the EPA's permitting policy for injection wells that violate the SDWA as well as the EPA's application of the EJ Policy to all people, regardless of geography or proximity to oil and gas operations.

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STATEMENT OF COMPLIANCE WITH WORD LIMITATION

This document complies with the word limitation of 40 C.F.R. §124.19(d)(3), because, excluding the parts of the document exempted by 40 C.F.R. § 124.19(d)(e), this document contains fewer than 7,000 words.

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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 22 day of May, 2024.

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