

EPA REGION 8'S RESPONSE TO PETITION FOR REVIEW

Attachment A

Doc 1152, Determination on Remand, Powertech (USA) Inc., Class III
Area Permit No. SD31231-00000 and Class V Area Permit No.
SD52173-00000 (March 14, 2025)

Determination on Remand
Powertech (USA) Inc.
Class III Area Permit No. SD31231-00000
and
Class V Area Permit No. SD52173-00000

Background

The EPA Region 8 Underground Injection Control (UIC) Program issued two UIC Area Permits to Powertech (USA) Inc. (Powertech) for injection activities related to uranium recovery in the southern Black Hills of South Dakota on November 24, 2020. One is a UIC Class III Area Permit for injection wells for the In-Situ Recovery (ISR) of uranium in the Inyan Kara Formation. The second is a UIC Class V Area Permit for deep injection wells that will be used to dispose of ISR process waste fluids, after treatment to ensure that the injected fluids are below radioactive or hazardous waste levels, into the Minnelusa Formation below the Inyan Kara. EPA also issued an aquifer exemption approval in connection with the UIC Class III Area Permit. Specifically, this approval exempts from protection under the Safe Drinking Water Act (SDWA), the uranium-bearing portions of the Inyan Kara Group aquifers in Burdock Area Wellfields 1 through 5, 9 and 10 and Dewey Area Wellfields 1 through 4.

The Oglala Sioux Tribe petitioned for review of the Permits before the Environmental Appeals Board (EAB) on December 24, 2020. On September 3, 2024, the EAB issued an Order denying review in part and remanding in part. The EAB provided that “the Board remands the permits in part and directs the Region to apply the correct legal standard for developing the administrative record, ensure that the record includes all materials required by the part 124 regulations, consider any comments received on the parts of the permit decisions not disposed of by this order in light of any updated record, revise its response to comments document, and take further action, as appropriate, consistent with the part 124 regulations, in reissuing its permit decisions.” *In re Powertech*, UIC Appeal No. 20-01, *Order Denying Review in Part and Remanding in Part*, p. 24 fn. 23, (September 3, 2024) (*Order*).

Review on Remand

Consistent with the EAB’s September 3, 2024 Order and 40 C.F.R. part 124, Region 8 conducted a review to determine whether the administrative record needed to be revised in accordance with the regulations at 40 C.F.R. § 124.9 and § 124.18. As a result of this review, the Region provides clarifications and updates the record with additional documents.

Clarifications

1. **Ogalala Sioux Tribe’s 2017 comments.** In its Order, the EAB explained that the Oglala Sioux Tribe’s 2017 comments are required to be part of the administrative record under 40 C.F.R. § 124.18. *Order* at p. 21. The Region clarifies that the documents submitted to Region 8 by the Oglala Sioux Tribe during the 2017 comment period were included in the original 2020 administrative record¹, and Region 8 considered them prior to making the permitting decisions

¹ The original 2020 administrative record refers to the final administrative record for the Class III area permit, Class V area permit, and aquifer exemption decision issued on November 24, 2020.

in November 2020. These documents were also a part of the 2019 draft permit administrative record in accordance with 40 C.F.R. § 124.9 and were available for public review and comment. This is in the administrative record as Document #644.

2. **2008 Powertech permit application.** The EAB's Order noted in a footnote that there was a 2008 application submitted to the Region that was deemed "administratively complete." *Order* at p. 21, fn. 17. The majority of the December 2008 Class III Permit application from Powertech was submitted to the EPA by Powertech during the 2017 public comment period as an attachment to its comments. Therefore, it was included in the original administrative record and considered prior to making the permitting decisions in November 2020. This portion of the 2008 application was in the 2019 draft permit administrative record and was available for public review and comment. This is in the administrative record as Document #604. The Region also acknowledges the EAB's statements in footnote 17 of the Order and agrees that the entire 2008 application should have been included in the original administrative record both because it was submitted as an attachment to a public comment and because it is part of the "application" referenced in 40 C.F.R. § 124.9(b)(1). The Region's review of documents identified some attachments to the 2008 application that were not included in Document #604, and the Region has added those to the supplemental administrative records. While the 2008 Class III Permit application and associated information were considered and are part of the record, the Region found them to be technically deficient, preventing further processing of the 2008 application. Therefore, the information in these applications was considered and rejected. The 2013 Class III Permit application superseded the information in this application.
3. **2012 Powertech permit application.** The 2012 Class III Permit application from Powertech is substantially similar to the final 2013 Class III Permit application, the latter which was included in the original administrative record as Document #238. Therefore, the majority of the 2012 application materials were available for public review and comment in 2019. In its January 15, 2013 application submittal letter, Powertech provided an index of changes from the 2012 application to the 2013 application, that explains the minimal updates made. Document #964, Bates Page 093574. The Region acknowledges its error in failing to include this 2012 application in the original administrative record. The Region should have included the 2012 application in the original administrative record because it was part of the "application" referenced in 40 C.F.R. § 124.9(b)(1), and the Region has added that application to the supplemental administrative record. The 2012 Class III Permit application was considered and is part of the record, but the Region found it to be technically deficient, preventing further processing of the application. Therefore, the information in this application was considered and rejected. The 2013 Class III Permit application superseded the information in this earlier application.
4. **2010 Powertech permit application.** Similarly, the 2010 Class V Permit application and associated information was considered and is part of the record, but the Region found it to be technically deficient, preventing further processing of the application. Therefore, the information in this application was considered and rejected. The 2012 Class V Permit application superseded the information in the technically deficient 2010 application. The Region acknowledges its error in failing to include this application in the original administrative record. The Region should have included the 2010 application in the original administrative record because it was part of the "application" referenced in 40 C.F.R. § 124.9(b)(1). The Region has added this application to the supplemental administrative record.

Updates to the Administrative Record

On remand, the UIC program staff completed a detailed search and review to determine whether there were, in addition to the documents referred to above, other documents that should have been included in the administrative record, in accordance with 40 C.F.R. § 124.18. The Region's review of records did reveal a few new documents that were also considered, prior to making the permitting decisions in November 2020, such as a number of communications between EPA and Powertech, EPA and Tribes, and EPA and other outside parties. The documents added to the administrative record begin at Document #964 and can be found at <https://www.regulations.gov/docket/EPA-R08-OW-2025-0116>. None of the documents added to the record contain any new substantive information. For example, as noted above, the Region is adding documents related to the 2008 and 2012 Class III applications and the 2010 Class V application. However, the Region reviewed and considered these submissions, but because there was no information identified that raised new issues or substantial new questions, Region 8 is reissuing the final permits with no changes from the 2020 permits. With this decision, Region 8 is only updating the administrative record with the following documents: this Determination, the documents identified herein, a revised Response to Comments document, and the final Class III and Class V Area Permits. Accordingly, Region 8 has decided not to exercise its discretion to reopen the Permits for additional public notice and comment. See 40 C.F.R. § 124.14(b).

Appeal Process

The final permit decisions shall become effective 30 days after service of notice of the decision unless review is requested on the permit under 40 C.F.R. § 124.19. Those who wish to appeal the final permit decisions can find information about filing a petition at 40 C.F.R. 124.19(a).

Appeal of these Permits are limited by the EAB's Order. In its remand order, the EAB noted that "[a]nyone dissatisfied with the Region's decision on remand must file a petition seeking Board review in order to exhaust administrative remedies under 40 C.F.R. § 124.19(l). Any such appeal shall be limited to the issues considered on remand and any modifications made to the permits as a result of the remand." *Order* at p. 24 fn. 23. The Order also preserved for review "(1) the SDWA issues addressed in the [*Oglala Sioux Tribe Petition for Review*, December 24, 2020], including the Tribe's challenges to the Region's cumulative effects analysis under EPA's UIC regulations at 40 C.F.R § 144.33(c)(3), and (2) the Tribe's de facto rulemaking claim. To the extent that these preserved issues remain after remand, the Tribe may, if it so chooses, raise these issues in a new petition seeking review of the Region's action on remand."

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