

EPA REGION 8'S RESPONSE TO PETITION FOR REVIEW

Attachment B

Doc 1153, EPA Dewey-Burdock Response to Public Comments,
including descriptions of changes from the 2017 draft to final UIC Class
III and Class V Permits, updated 2025 (March 14, 2025)

EPA Region 8 Underground Injection Control (UIC) Program

Revised Response to Public Comments

March 14, 2025

Introduction

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 3, (September 2024) (*Order*).

Consistent with the EAB’s Order, the EPA Region 8 provides this Revised Response to Comments. As explained in the accompanying Determination on Remand, the Region’s review of records did not reveal any substantive new information. *Determination on Remand*, p. 3. 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. As there were no changes to the final permits, this Revised Response to Comments addresses only the comments and responses related to the updated administrative record, consistent with the EAB Order. Accordingly, the Region only revised Responses 183, 184, and 185. The responses below replace the responses in the November 24, 2020, Response to Comments. The November 24, 2020, Response to Comments document otherwise remains unchanged and can be found at <https://www.regulations.gov/docket/>, Document #1.

Revised Response to Comment

- 183. Commenters raised concern that there has been extensive discussion of the process with the applicant and the uranium industry, resulting in a procedure, guidance, and draft documents. They stated that the draft permit and draft aquifer exemption documents often mimic others, including documents from the applicant, rather than creating a thoughtful analysis of the situation.**

Response #183:

See Response #184 below for response to comment regarding discussion of the process with the applicant and industry on alleged process and guidance.

Consistent with the ordinary process for working with permit applicants, EPA has had regular communication with Powertech throughout the application and review process. It is a normal part of the permitting process to communicate with an applicant. It is often necessary to request more information or otherwise seek clarification from the applicant in order to make draft decisions. Neither the Safe Drinking Water Act nor its implementing regulations prohibit this type of communication.

EPA's obligation when reviewing permit applications is to review the required information submitted by the applicant to determine whether an injection activity can be permitted sufficiently to prevent endangerment of USDWs. In this case, EPA reviewed all the necessary information submitted by the applicant in order to draft the permits and Aquifer Exemption (AE) Record of Decision (ROD). Through EPA's independent analysis of all of the required information, EPA proposed permit conditions for the Class III and V permits that would provide adequate protection of USDWs and made an AE decision consistent with the regulations. The commenters do not allege that any of the permit conditions fail to meet the UIC requirements or that they do not protect USDWs; rather they allege that because the permits and AE ROD look like other documents, including documents from the applicant, that EPA did not thoughtfully analyze the information. However, since it is the applicant's duty to provide the information to EPA, the permits will necessarily reflect this information and therefore look like the documents provided to EPA. The 132-page Class III Area Permit Fact Sheet, 49-page Class V Area Permit Fact Sheet, and 29-page AE ROD provide extensive explanation as to the reasons for the permit conditions in the Permits and AE decision.

184. A few commenters raised concern about a document that was obtained through a FOIA request on the Dewey Burdock project. The commenters refer to the document as a "guidance" document. The commenters assert that the EPA must engage in rulemaking to promulgate rules regarding the subjects covered in this document. They believe that the document includes policy pronouncements that require notice and comment rulemaking because they assert the document includes "binding norms" that the agency is obligated to apply to future Class III permit applications. The commenters also expressed concern that the EPA communicated with the mining industry and not the public in developing the document, which lacked transparency to the public.

Response #184: The document referred to by the commenters is titled, "Discussion of Zone of Influence, Area of Review, and the Aquifer Exemption Boundary for Class III Injection Wells used for the In-Situ Leaching (ISL) of Uranium." This document is neither a de facto rule nor an agency guidance document. This document was drafted by a Region 8 staff member for purposes of discussion with Powertech and its consultants with the goal of helping them understand the necessary information to submit in an application to aid in the agency's review of regulatory requirements for the AOR and AE boundary. The discussion document, which primarily identifies the relevant regulations, was never used as agency policy or guidance. Neither of the concepts discussed in this document, the area of review (AOR) or the aquifer exemption (AE) boundary, requires additional rulemaking before EPA can issue permitting or aquifer exemption decisions in the ISL uranium context. The discussion document did not establish policy, guidance, or "binding norms" applicable to this or other action because it was only used to

explain the site-specific information that is required by existing regulations at 40 C.F.R. §§ 144.7 and 146.4 (AEs) and 40 C.F.R. § 146.6 (AOR).

These regulations make clear that both the AOR and the AE boundary are site-specific determinations, meaning that EPA must determine them in each instance based on site-specific information provided to the EPA. The regulation for the AOR is at 40 C.F.R. § 146.6. This regulation explicitly directs that the AOR must be determined site-specifically, based on one of two enumerated methods, the zone of endangering influence (40 C.F.R. § 146.6(a)), or a fixed radius (40 C.F.R. § 146.6(b)). In addition, the AOR regulation specifically contemplates that the Director can solicit input from industry in the project area to determine the AOR. See 40 C.F.R. § 146.6. Consistent with this, the administrative record reflects that Region 8 engaged in discussions with the applicant and its consultant regarding the AOR and with other ISL experts in industry, states and other EPA Regions.

Discussions about the AOR is a normal part of the application process, as the applicant may have questions about the regulatory process and would have the site-specific information necessary to inform the appropriate AOR. The zone of endangering influence regulation provides the best description of the purpose of the AOR. “In the case of an application for an area permit..., the project area plus a circumscribing area the width of which is the lateral distance from the perimeter of the project area, *in which the pressures in the injection zone may cause the migration of the injection and/or formation fluid into an underground source of drinking water.*” 40 C.F.R. § 146.6(a)(1)(ii) (emphasis added). In this case, the Region applied the applicable regulatory criteria to determine an appropriate AOR. The Class III permit fact sheet explained that the Region used the fixed radius method under 40 C.F.R. § 146.6(b) because the zone of endangering influence method was not appropriate. Class III Fact Sheet at p. 30, Bates p. 014689. It further explained that the “Dewey-Burdock Project Area of Review has been investigated for any features that would compromise the confining zones that are necessary to contain the injected fluids within the authorized injection zone.” *Id.*

While the commenters express concern about the lack of opportunity for public comment, the public was given an opportunity to provide comments on the site-specific AOR in the project, both in the original permit proposal in 2017 and in the subsequent permit re-proposal in 2019. The fact sheet provides detail on the AOR. However, commenters did not provide any specific comments on this issue for either the Class III or Class V permits.

The same is true of the aquifer exemption boundary. There is no need to promulgate additional regulations to determine an AE boundary. The appropriate boundary will be based on the existing criteria in 40 C.F.R. §§ 144.7 and 146.4 and on site-specific factors related to those criteria. In this case, the aquifer exemption relates only to the Class III permit, in the injection zone identified for mining. The aquifer exemption decision was based on the criteria at 40 C.F.R. § 146.4(b)(1), which allows for exemption of an aquifer because “it is mineral, hydrocarbon or geothermal energy producing, or can be demonstrated by a permit applicant as part of a permit application for a Class II or III operation to contain minerals or hydrocarbons that considering their quantity and location are expected to be commercially producible.” It is both necessary and appropriate for EPA to communicate with the applicant regarding the aquifer exemption boundary, as they have the information necessary to determine the appropriate AE boundary; here, they were required to provide information on commercial producibility of the ore deposits pursuant to 40 C.F.R. § 144.7(c)(1). Following review of the necessary information, EPA proposed the AE with a description of the boundary that the public had opportunity to

comment on. The public also had the opportunity to comment on the underlying information that EPA relied on. The Region did not receive comments on the appropriateness of the aquifer exemption boundary.

Finally, to the extent that commenters have asserted that the EPA must engage in national rulemaking, this issue is outside the scope of these permitting and AE actions.

185. The Tribe asserts that all of the documents and records, including all emails, reflecting the coordination between EPA and Powertech and any of its consultants must be made part of the administrative record for this proceeding, and must be disclosed to the public during the public comment process in order to allow for meaningful public review and comment of the proposed Draft UIC permits. The Tribe submitted several of these documents with the comment letter, which the Tribe believes represents examples of the discussions improperly omitted from the existing public record.

Response #185: The Region completed a detailed search and review of documents to ensure that the administrative record includes all information required by 40 C.F.R. § 124.18. The documents submitted by the Oglala Sioux Tribe as part of its 2017 comments were available for public review during the 2019 comment period. These were included in the original 2020 administrative record at Document #644. The Region has updated the record with documents from 2008 to 2013 that were also considered. 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: final Class III and V area permits with a change to the date of issuance, the Determination on Remand, this revised Responses to Comments document, and the additional documents to the record, which are identified in the administrative record index. 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).