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

In re Powertech (USA) Inc. Permit Nos. SD31231-00000 & SD52173-00000	)	UIC Appeal No. 20-01

ORDER DENYING MOTION TO AMEND PETITION FOR REVIEW, DENYING REVIEW ON THE PETITION'S NATIONAL HISTORIC PRESERVATION ACT SECTION 106 ISSUE, AND IDENTIFYING ISSUES IN THE PETITION REMAINING FOR RESOLUTION

I. *INTRODUCTION*

The Oglala Sioux Tribe ("Tribe") filed a petition with the Environmental Appeals Board ("Board") seeking review of two Underground Injection Control ("UIC") area permit decisions by U.S. Environmental Protection Agency Region 8 ("Region"). The Region issued the two UIC permits, a Class III and a Class V UIC area permit, to Powertech (USA) Inc. authorizing it to conduct uranium mining operation activities in the Dewey-Burdock in-situ recovery project site located in the Black Hills of South Dakota. The Tribe's petition challenges the permit decisions on various grounds, including that the Region failed to demonstrate compliance with the requirements of the National Historic Preservation Act ("NHPA"). The Board stayed this matter after the filing of the petition, primarily to allow for the resolution of litigation, including NHPA compliance issues, before the United States Court of Appeals for the District of Columbia Circuit in *Oglala Sioux Tribe v. U.S. Nuclear Regulatory Commission*, 45 F.4th 291 (D.C. Cir. 2022). After the D.C. Circuit's decision, the Tribe filed a motion to amend its petition, contending that

"significant events have transpired which bear directly on this Board's review of the matters raised in the Petition" that warrant allowing the Tribe to amend its petition. Motion to Amend Petition for Review 1 (April 21, 2023) ("Mot. to Amend"). The Region and Powertech opposed the motion and filed briefs in support of their opposition.

To assist the Board in its consideration of the motion to amend the petition, the Board issued an order requiring the parties to address the impact of the D.C. Circuit's decision in *Oglala Sioux Tribe* on the issues raised in the petition, identify what issues remain for Board resolution, and address some specific issues raised in the pleadings related to the motion to amend.

After consideration of the parties' submissions and for the reasons set forth below, the Board denies the Tribe's motion to amend the petition and denies review on the NHPA section 106 issue raised in the petition. The Board also identifies the issues in the petition that remain for Board resolution.

II. *MOTION TO AMEND*

According to the Tribe, three events justify amending its petition for review: (1) the development of a September 2021 cultural resources survey protocol for the Crow Butte Resources Inc. In Situ Uranium Recovery Facility in Nebraska; (2) the passing of a local ordinance in Fall River County, South Dakota, in November 2022, that "designat[es] the mining of uranium a public nuisance"; and (3) announcements made in three preliminary economic assessment documents (dated December 23, 2020, May 10, 2021, and August 10, 2021) that discuss changes in the scope of the Dewey-Burdock project. Mot. to Amend at 1-2.

In opposing the Tribe's motion to amend, the Region argues that the Board has treated the amendment of petitions as an issue of timeliness under its regulations at 40 C.F.R. part 124

and that the Board only permits late filings in "special circumstances," which are not present here. EPA Region 8 Response to Petitioner's Motion to Amend Petition for Review 2, 4 (May 8, 2023) ("Region's Resp. to Mot. to Amend"). The Region and Powertech both argue that the three events the Tribe identifies occurred well after the issuance of the permits on November 24, 2020, are not relevant to the Board's review of the challenged permits, and do not raise any important policy considerations that would justify amendment of the petition. *See id*. at 4-10; Powertech's Response in Opposition to Petitioner's Motion to Amend Petition, 5, 8-14 (May 8, 2023) ("Powertech's Resp. to Mot. to Amend").

For the reasons set forth below, the Board finds that the Tribe has not presented special circumstances that warrant amending the petition and denies the motion to amend.

A. *Board Precedent on Amending a Timely-Filed Petition for Review*

The Board is generally reluctant to allow a party to amend a timely-filed petition.[1] *See, e.g., In re Indeck-Elwood, LLC*, 13 E.A.D. 126, 139 n.36 (EAB 2006) (noting Board's general practice of only entertaining issues raised during the thirty-day petition filing deadline). The Board, however, has allowed petition amendment under special circumstances. *See, e.g., In re Indeck-Elwood, LLC*, PSD Appeal No. 03-04 (EAB Feb. 3, 2004) (Order (1) Granting Motion for Leave to File Amended Petition and (2) Requesting Region V and/or OGC to File a Response); *In re Sierra Pac. Indus.*, 16 E.A.D. 1, 18 (EAB 2013). Special circumstances have

[1] A petition for review must be filed within thirty days after the Region serves notice of the issuance of a final permit decision. 40 C.F.R. § 124.19(a)(3). Timeliness is a threshold procedural requirement, that helps bring repose and certainty to the administrative process and protects the permit applicant's interest in the timely resolution of the permitting process. *See, e.g*., *In re Sierra Pac*. *Indus.*, 16 E.A.D. 1, 15-16 & n.8 (EAB 2013); *In re Zion Energy, L.L.C*., 9 E.A.D. 701, 707 (EAB 2001).

been found by the Board in very narrow situations: where the Agency made inconsistent post-permit issuance pronouncements that could have had an impact on a party's appeals rights, and where a new legal issue regarding the permit issuer's compliance with another federal statute associated with Agency permitting responsibilities called into question the validity of the permit as a whole. *In re City and Cty. of San Francisco*, NPDES Appeal No. 20-01, at 4-5 (EAB June 18, 2020) (Order Denying Motion for Reconsideration and Granting Petitioner Leave to Supplement Petition for Review, with Limitations) (authorizing supplementation of the petition to address inconsistent post-permit issuance pronouncements by the Agency and finding that supplementation would serve the interests of efficient, fair, and impartial adjudication); *Indeck-Elwood,* PSD Appeal No. 03-04, at 7-9 (allowing amendment to the petition to address questions about the permit issuer's obligations under the Endangered Species Act ("ESA") that called into question the entire permit); *cf. In re Phelps Dodge Corp.*, 10 E.A.D. 460, 522-25 (EAB 2002) (declining to dismiss late argument on timeliness grounds because issue raised called into question whether Agency had complied with affirmative obligations under the ESA).[2]

[2] The Tribe argues that special circumstances exist here because the delay between the initial petition and the D.C. Circuit's decision "is of the same kind" where the Board has found special circumstances. Reply to EPA Region 8's and Powertech's Responses to Motion to Amend Petition for Review 2 (May 18, 2023) ("Tribe's Reply to Mot. to Amend") (referencing cases cited *In re Town of Marshfield*, NPDES Appeal No. 07-03 (EAB Mar. 27, 2007) (Order Denying Review)). We disagree. The cases on which the Tribe relies did not involve the amendment of a timely-filed petition. In addition, it was entirely foreseeable that the D.C. Circuit litigation initiated by the Tribe would take time to resolve. This stands in contrast to the narrow situations where the Board has found special circumstances and allowed a late-filed petition when the delay was due to a natural disaster, a commercial delivery service experiencing unanticipated aircraft problems, or the permitting authority providing incorrect information on where to file.

In evaluating whether special circumstances are present that justify allowing petition amendment, the Board carefully examines the facts and particular circumstances of the case, including the movant's support for its request to amend the petition. *See, e.g., Indeck-Elwood*, PSD Appeal No. 03-04, at 10-11 (allowing amendment of petition "[i]n light of the particular circumstances" of the case); *see also* 40 C.F.R. § 124.19(n) (authorizing Board to "do all acts and take all measures necessary for the efficient, fair, and impartial adjudication" of permit appeals).[3]

B. *The Motion to Amend Does Not Present Special Circumstances and Is Based on Post-Decisional Information*

1. *The Three Events Identified in the Motion to Amend Do Not Present Special Circumstances*

a. *The Development of the September 2021 Cultural Resources Survey Protocol for the Crow Butte Resources Facility in Nebraska*

The Tribe asserts that the development of a September 2021 Cultural Resources *S*urvey Protocol for the Crow Butte Resources Facility in Nebraska provides a basis for amending its petition. In support, it argues that "an important policy consideration exists" here; namely, "whether and [to] what extent" the Region is "obliged, prior to permit issuance, to comply with NHPA requirements aimed at protecting the significant cultural resources of the Oglala Sioux Tribe and Lakota people generally." Mot. to Amend. at 3 (citing *Indeck-Elwood*, 13 E.A.D. at 139 n.36). The Tribe adds "in the intervening almost two and half years" since the filing of the

[3] The Tribe contends that "the Board does not appear to have a regulation specifically addressing amendments" to petitions and suggests the Board follow rule 15(d) of the Federal Rules of Civil Procedure. Mot. to Amend at 4. As noted above, in reviewing a motion to amend a petition, we are guided by the part 124 regulations and Board caselaw. The Federal Rules of Civil Procedure do not apply in this administrative permit proceeding. *Cf. In re Town of Newmarket*, 16 E.A.D. 182, 246 (EAB 2013).

initial petition, the Nuclear Regulatory Commission ("NRC") and the Tribe "have jointly developed and endorsed" the Crow Butte survey protocol, which the Tribe contends is a significant event. *Id*. at 1. The Tribe also maintains the survey protocol "demonstrates that the information related to cultural resources is not 'unavailable'" as the Region's decision "effectively asserted" when it designated the NRC as the lead agency for NHPA section 106 compliance. *Id*.

Contrary to the Tribe's assertions, the development of the survey protocol to identify cultural resources of significance to the Tribe at the Crow Butte Resources Facility in Nebraska does not constitute special circumstances justifying amendment of the petition. First, the Crow Butte survey protocol is not relevant to the question of the Region's compliance with the NHPA in the context of the November 2020 UIC permits. The survey protocol was developed for a different facility, located in a different state, for a different permit proceeding well after the issuance of the UIC permits.

Second, as the Region correctly observes, there is no issue here pertaining to "whether" the Region had an obligation to comply with the NHPA prior to issuing the UIC permits. Region's Resp. to Mot. to Amend at 5. The record before us shows that the Region determined that the Dewey-Burdock project is an "undertaking" within the meaning of 36 C.F.R. § 800.16(y) subject to the NHPA.[4] Region 8, U.S. EPA, *Underground Injection Control (UIC) Program*

[4] Section 106 of the NHPA requires federal agencies with "authority to license any undertaking," to "take into account the effect of the undertaking on any historic property" prior to issuance of any license. NHPA § 106, 54 U.S.C. § 306108. The Act defines "historic property" to include "any prehistoric or historic district, site, building, structure, or object included on, or eligible for inclusion on, the National Register [of Historic Places]" or any "artifacts, records, and material remains relating" to such. NHPA § 301, 54 U.S.C. §§ 300308,

Response to Public Comments, at 309-10 (Cmt. #263) (Nov. 24, 2020) ("Resp. to Cmts."). Further, the issue pertaining "to what extent" the Region was obligated to comply with NHPA section 106 is addressed in the petition. *See, e.g.*, Petition for Review 8, 16, 20-21 (Dec. 24, 2020) ("Pet."). In its response to comments, the Region explained that it chose to comply with its NHPA section 106 obligations by designating the NRC as the lead federal agency for the Dewey-Burdock project pursuant to 36 C.F.R. § 800.2(a)(2).[5] Resp. to Cmts. at 309-11 (Cmt. #263). To effectuate the designation, the Region signed the *Programmatic Agreement Among U.S. Nuclear Regulatory Commission, U.S. Bureau of Land and Management, South Dakota State Historic Preservation Office, Powertech (USA) Inc., and Advisory Council on Historic Preservation Regarding the Dewey-Burdock in Situ Recovery Project Located in Custer and Fall River Counties South Dakota* ("Programmatic Agreement"), agreeing to its terms, and satisfied the terms of stipulation 7 of the Agreement by providing the signature page to all signatories and consulting parties under the Agreement. *Id.* at 310-11; *see* Letter from Darcy O'Connor, Dir. Water Div., Region 8, U.S. EPA, to John Tappert, Fed. Pres. Officer, NRC (Nov. 13, 2020) (Doc. 664) ("Region's NHPA Lead Agency Letter"); EPA Signature Page for Programmatic Agreement (digitally signed by Darcy O'Connor, Dir., Water Div., Region 8, U.S. EPA, on Nov. 13, 2020) (Doc. 665) ("EPA Signature Page"); Programmatic Agreement (Mar. 19, 2014) (Doc.

300311. The regulations define an "undertaking" to include a project "requiring a Federal permit, license or approval." 36 C.F.R. § 800.16(y).

[5] This provision states that "[i]f more than one Federal agency is involved in an undertaking, some or all the agencies may designate a lead Federal agency" which "shall act on their behalf, fulfilling their collective responsibilities under [NHPA] section 106." 36 C.F.R. § 800.2(a)(2).

671).[6] The Programmatic Agreement documents actions taken to identify and protect historic properties, including cultural resources, as well as protective efforts that will continue for the life of the Dewey-Burdock project. *See* Programmatic Agreement at 5-12; Resp. to Cmts. at 311 (describing Appendix B to the Programmatic Agreement addressing cultural resources identified within and adjacent to the project site boundary). The Tribe's petition argues that "EPA has failed to comply with the consultation and historic resources protection requirements of the NHPA" with regard to the Dewey-Burdock project. Pet. at 16. The petition also objects to the Region's reliance on the NRC's survey claiming the survey is "discredited" and that the Programmatic Agreement is "legally" insufficient. *Id*. at 20-21. Thus, the case before us stands in contrast to *Indeck* on which the Tribe relies. Unlike this matter, in *Indeck*, the issue the Board identified as an important policy consideration (i.e., whether the agency had complied with consultation obligations under ESA section 7) had not been raised in the petition. *See Indeck-Elwood*, PSD Appeal No. 03-04, at 2-3.[7] Here, the issue of NHPA compliance was raised in the petition, and there are no important policy considerations supporting petition amendment.

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[6] The cited documents are part of the public records for the challenged UIC permits found at regulations.gov and the Region's website. Region 8, U.S. EPA, *EPA Dewey-Burdock Class III and Class V Injection Well Final Area Permits*, https://www.epa.gov/uic/epa-dewey-burdock-class-iii-and-class-v-injection-well-final-area-permits (last visited Nov. 16, 2023); *see* 40 C.F.R. § 124.18(b).

[7] The Tribe also cites *Indeck* to argue that the Board "regularly" grants motions to amend a petition where there is "no discernible prejudice to the permittee because the amended or supplemental petition [is] filed before any responsive pleadings," and no responsive briefs have been filed. Mot. to Amend at 2-3. The Tribe misstates the Board's treatment of motions to amend. The Board's general practice is to entertain issues that are raised during the thirty-day deadline for filing petitions, and it is reluctant to allow amendment of a timely-filed petition. *Indeck-Elwood*, 13 E.A.D. at 139 n.36; Part II.A above. The lack of a responsive brief was not dispositive in *Indeck*, as the Tribe suggests, but rather was one of three factors the Board

Further, the D.C. Circuit held that the NRC satisfied its NHPA statutory and regulatory obligations, rejecting, among other things, the Tribe's challenges to the Programmatic Agreement. *Oglala Sioux Tribe v. U.S. Nuclear Regulatory Comm'n*, 45 F.4th 291, 306 (D.C. Cir. 2022); *see also* Part III.B below.[8] The Tribe's arguments about the Crow Butte survey protocol appear largely to be an attempt to bolster the arguments framed in its initial petition and relitigate the D.C. Circuit's decision in *Oglala Sioux Tribe* and do not constitute special circumstances.

Finally, the Tribe mischaracterizes the Region's reasoning for designating the NRC as the lead federal agency. The Region did not premise its designation of the NRC as the lead federal agency on the unavailability of information related to cultural resources, as the Tribe suggests. *See* Additional Briefing by EPA Region 8, at 8 (July 28, 2023) ("Region's Add'l. Br."). Rather, the Region explained its designation decision, stating that "[h]aving a single agency serve as the lead, with input from other agencies as appropriate, promotes efficiency in government," and that "a separate, parallel NHPA compliance effort would not meaningfully alter the protection of

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considered in its examination of the particular circumstances of the case. *See Indeck-Elwood*, PSD Appeal No. 03-04, at 7-12 (the factors considered included an issue not raised in the petition which, as discussed above, called into question the validity of the entire permit, no responsive briefs had been filed, and permittee would not be prejudiced by petition amendment). In that case, it was the totality of the circumstances that resulted in a finding of special circumstances, not one single factor. *See id.*

[8] In its additional briefing, the Tribe contends that the NRC's NHPA process is incomplete and there is an ongoing process to which the Crowe Butte survey protocol is relevant. Oglala Sioux Tribe's Response to Board Order Requesting Additional Briefing 6-7 (July 28, 2023) ("Tribe's Add'l. Br."). The D.C. Circuit upheld the NRC's phased approach to identifying and evaluating historic properties in the Programmatic Agreement, and there is nothing further for resolution on that issue. *Oglala Sioux Tribe*, 45 F.4th at 306. *See* Part III.B. below.

historic properties in connection with this undertaking." Resp. to Cmts. at 310-311 (Cmt. #263); s*ee* Region's Resp. to Mot. to Amend at 6-7 (explaining that it did not designate the NRC as lead agency because of an alleged unavailability of information related to cultural resources); Region's Add'l. Br. at 8 (explaining that it "did not 'effectively' or otherwise base any aspect of its decision concerning NHPA compliance on the unavailability of information related to cultural resources at *any* facility").

For the reasons discussed above, the development of the Crow Butte survey protocol does not present special circumstances justifying amendment of the petition.

b. *The Fall River County Ordinance*

The Tribe also alleges that a November 2022 Fall River County local ordinance provides a basis for amending the petition. Mot. to Amend at 2. According to the Tribe, the ordinance renders the Dewey-Burdock Project "ostensibly unlawful," *id*., and "an important policy consideration exists [here] as to whether [the Region] may issue a final and effective permit for an activity that is unlawful under local laws," *id*. at 3. *See also* Reply to EPA Region 8's and Powertech's Responses to Motion to Amend Petition for Review 4 (May 18, 2023) ("Tribe's Reply to Mot. to Amend") (arguing that "the illegality of the Project under local law" is an "issue[] with important policy considerations.").

The Board has explained on several occasions that its review of UIC permits is narrow in focus and limited only to the Safe Drinking Water Act ("SDWA") and protection of underground sources of drinking water. *See, e.g.*, *In re Sammy-Mar, LLC*, 17 E.A.D. 88, 98 (EAB 2016); *In re Env't Disposal Sys*., 12 E.A.D. 254, 266 (EAB 2005). The Board is not the proper forum for disputes that "are governed by legal precepts other than those contained in the SDWA and UIC regulations," or that "flow from decisions made at the state or local levels," and "not from

requirements of the SDWA UIC program." *Env't. Disposal*, 12 E.A.D. at 267, 295; *In re Federated Oil & Gas*, 6 E.A.D. 722, 725 (EAB 1997) (noting that the SDWA and UIC regulations "establish the *only* criteria that EPA may use in deciding whether to grant or deny an application for a UIC permit" (quoting *In re Envotech, L.P.*, 6 E.A.D. 260, 264 (EAB 1996))).

In its June 2023 Order, the Board required the parties to explain how Board consideration of the local ordinance on which the Tribe relies is consistent with Board precedent addressing the scope of its review of UIC permitting decisions. Order Requiring Additional Briefing 2 (June 30, 2023) ("Board's June 2023 Order"). In response, the Tribe attempts to distinguish this matter from the cases referenced in the Board's order. The Tribe contends that at stake in those cases "was how the local regulations raised by the petitioner would apply to the particular project at issue" and that "[i]n contrast" in the matter at hand "the project itself has been deemed illegal as a nuisance in the locale in which it is proposed." Oglala Sioux Tribe's Response to Board Order Requesting Additional Briefing 7 (July 28, 2023) ("Tribe's Add'l. Br."). The Tribe adds that "the question [here] does not involve how the project will impact local emergency services, property values, or hunters" (referencing *Sammy-Mar*), "nor [is it] a request for the Board to resolve competing strictly private party property rights" (referencing *Env't. Disposal* and *Federated Oil*). *Id*.

The Tribe's arguments are not persuasive, as what the Tribe is asking us to do here—to allow the amendment of its petition to consider the impact of a local ordinance on the permit decisions—is fundamentally no different from requests the Board has rejected on the basis of the principles laid out above. In *Puna Geothermal*, for example, the petitioner cited local zoning restrictions that it claimed affected the siting of the facility at issue, and it asked the Board to address that siting question. *In re Puna Geothermal Venture*, 9 E.A.D. 243, 278 (EAB 2000).

The Board noted that a zoning conflict is a matter to be resolved at the state or local level, not by the Board.[9] *Id*. Although the Tribe identifies a different conflict with local law, namely, that a local ordinance renders uranium mining a nuisance, the issue is no different from the local zoning law we confronted in *Puna*. This is the kind of state or local law issue that falls outside the ambit of Board review, and therefore cannot provide a basis for amending the petition.[10] Any issues pertaining to the Fall River County ordinance need to be addressed at the appropriate state or local level; a petition before the Board is not the right forum for such disputes. *Cf. In re Suckla Farms, Inc.*, 4 E.A.D. 686, 695 (EAB 1993).[11]

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[9] The Board has also rejected, on jurisdictional grounds, claims raising questions about the choice of geographic location or siting of injection wells. In *Environmental Disposal*, for example, the Board noted that questions pertaining to injection well location are not subject to Board review because they "flow from decisions made at the state or local levels pursuant to state or local laws, and not from requirements of the SDWA UIC program." *Env't. Disposal*, 12 E.A.D. at 295. Thus, they "fall outside the ambit" of Board "jurisdiction in UIC permit appeals." *Id*. Also, in *Envotech*, the Board declined to review a UIC permit on the basis of arguments claiming local opposition to the siting of UIC wells, noting that siting issues "are a matter of state and local jurisdiction." *In re Envotech, L.P.*, 6 E.A.D. 260, 271-72 (EAB 1996).

[10] The Tribe cites a Fourth Circuit case for the proposition that certain local ordinances, such as the Fall River County ordinance, "may not have been preempted by" the SDWA. Tribe's Add'l. Br. at 8 (citing *EQT Prod. Co. v. Wender*, 870 F.3d 322 (4th Cir. 2017)). But the Fourth Circuit did not reach the issue of federal preemption under the SDWA, as the Tribe suggests. Rather, in *EQT*, the court examined a blanket prohibition of storage of wastewater in UIC wells, similar to the proposed Fall River County ordinance, noted that "[a] county has the 'power to abate nuisances, not to determine what shall be considered nuisances,'" and concluded that the ordinance was preempted by state law. *EQT Prod. Co*., 870 F.3d at 335-36 (quoting *Sharon Steel Corp. v. City of Fairmont*, 175 W.Va. 479, 334 S.E.2d 616, 626 (1985)).

[11] The Tribe also argues in its additional briefing that the question at this stage of the proceedings "is not how this Board may rule on the merits of the interplay between the ordinance and the UIC permit," but rather "whether the Board is obliged to uphold a permitting decision that contradicts a local ordinance that is more protective than the UIC permit." Tribe's Add'l. Br. at 7-8. The Tribe's arguments presume (1) the validity of the local ordinance, but as stated above the Board has no jurisdiction in the UIC permitting context to weigh in on issues that flow

Further, as the Region and Powertech correctly observe, nothing in the permits relieves Powertech of its obligation to comply with any applicable State and local laws and regulations. Region's Add'l. Br. at 9; Powertech's Resp. to Mot. to Amend at 11-12. In fact, the UIC regulations and the permits at issue here provide that the permittee must still comply with applicable state and local laws and regulations.[12] For instance, section 144.35(c) states that "[t]he issuance of a permit *does not authorize any injury to persons or property* or invasion of other private rights, *or any infringement of State or local law or regulations*." 40 C.F.R. § 144.35(c) (emphasis added). As the Board noted in *Beckman,* "[t]his means that even if a [UIC] permittee has met all federal requirements for issuance of a UIC permit, it is not by virtue of its federal UIC permit shielded from compliance with any valid state or local regulations governing its operations." *In re Beckman Prod. Serv.,* 5 E.A.D. 10, 23 (EAB 1994). The UIC permits at issue here comport with this regulation.

Accordingly, we conclude that the local ordinance does not constitute special circumstances warranting amendment of the petition.

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from state or local laws; and (2) that a threat to human health or the environment actually exists from issuance of the two UIC permits, but no such evidence has been presented.

[12] *See, e.g.,* Region 8, U.S. EPA, Final Class III Area Permit, at 1 (Nov. 24, 2020) ("Class III Permit") ("Issuance of this Permit does not convey property rights of any sort or any exclusive privilege; nor does it authorize any injury to persons or property, * * *, or any infringement of State or local law or regulations. Compliance with the terms of this Permit does not constitute a defense to any enforcement action brought under * * * any other law governing protection of public health or the environment, for any imminent and substantial endangerment to human health or the environment * * *. Nothing in this Permit relieves the Permittee of any duties under applicable State or local laws or regulations.").

c. *The Announcements About Proposed Changes in Project Scope and Design*

The Tribe also claims that three documents—entitled "NI 43-101 Technical Report, Preliminary Economic Assessments" published on December 23, 2020, May 10, 2021, and August 10, 2021—justify amending the petition. *See* Mot. to Amend at 2-3. According to the Tribe, these documents disclose "[s]ignificant changes" in the design and scope of the Dewey-Burdock Project that "have occurred" since the Region issued the UIC area permits. *Id*. The Tribe claims that these changes include expanded activities and the need for additional drilling that affects the Region's analysis and cumulative impacts assessment of the Dewey-Burdock Project. *Id.; see also* Tribe's Add'l. Br. at 8-9. These changes, the Tribe contends, present "a significant question" the Board should consider at this stage of the proceedings. Mot. to Amend at 3.

The three Preliminary Economic Assessment documents are not relevant to the matter before us and do not present an important policy consideration, as the Tribe suggests. As Powertech explains, the changes described in the documents are only proposals for future expansions of operations and the documents caution that there is no certainty that the preliminary economic assessment will be realized. Powertech's Resp. to Mot. to Amend. at 13; Powertech's Response to EAB Order of June 30, 2023, at 7 (July 28, 2023) ("Powertech's Add'l. Br."). The documents confirm this, and the Tribe acknowledges as much. *See, e.g.,* Supplemental Petition for Review, attach. 3 at 4, 9-10, 84 n.1, 96 n.1, 120, 132 n.1 (Apr. 21, 2023) ("Tribe's Supplemental Pet."); *see also* Tribe's Supplemental Pet. at 2 ("each one [of the preliminary economic assessments] details expanded *proposals* for operations related to the Dewey-Burdock property and surrounding areas") (emphasis added); *id*. at 4 ("The significant changes *proposed* through these documents * * *") (emphasis added). The documents also discuss the need for further

permitting. *See, e.g.,* Tribe's Supplemental Pet., attach. 3 at 5. Moreover, the challenged UIC permits expressly prohibit any underground injection activity not authorized by the permits, or by rule. Region 8, U.S. EPA, Final Class III Area Permit, at 1 (Nov. 24, 2020) ("Class III Permit"); Region 8, U.S. EPA, Final Class V Area Permit, at 1 (Nov. 24, 2020) ("Class V Permit"). And, as the Region explains, if Powertech chooses to modify the project in the future beyond the scope of the issued permits, it will have to seek a permit modification in accordance with 40 C.F.R. § 144.39, and submit an updated application or additional information as appropriate.[13] Region's Resp. to Mot. to Amend at 10. If the Region grants such permit modification, it would be a separate permitting process subject to challenge and Board review. *Id*.

In addition, the May 10, 2021, and August 10, 2021 Preliminary Economic Assessment documents are not relevant to the Region's November 24, 2020 permit decisions for the Dewey-Burdock project, as they relate to the Gas Hill Uranium project located in Fremont and Natrona Counties, Wyoming. *See* Powertech's Resp. to Mot. to Amend at 13-14. The only document potentially directly related to the Dewey-Burdock project is the December 23, 2020 document, and the petition already includes an attachment that discusses preliminary economic assessment results for that project and potential expansions.[14] Pet. at 26 (asserting that "the applicant has recently released documents that demonstrate planned expansions," including a press release

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[13] The Tribe even acknowledges that the December 2020 Preliminary Economic Assessment document recognizes the need for "Additional Permit/License amendments and approvals." Tribe's Supplemental Pet. at 4.

[14] The Board also notes that the report date for the December 2020 Preliminary Economic Assessment document pre-dates the Tribe's petition filing deadline.

announcing an increase in the amount of uranium ore proposed to be mined as part of the Dewey-Burdock project); *see also id*. attach. 16.

In summary, the three Preliminary Economic Assessment documents do not depict any actual changes in project scope and design, the petition already references a document relating to the preliminary economic assessment for the Dewey-Burdock project, and significantly the permits and applicable regulations require Powertech to seek a modification of the permits if it decides to engage in activities not authorized by those permits. We find the Tribe's request to amend the petition on the basis of the three Preliminary Economic Assessment documents an impermissible attempt to bolster the initial petition and conclude that the documents do not present special circumstances.

For the reasons discussed above, the three events identified by the Tribe in support of its motion to amend, both individually and collectively, do not present special circumstances justifying amendment of the petition.

2. *Documents on Which the Tribe Relies Are Post-Decisional*

Powertech also argues that the materials on which the Tribe relies for its motion to amend are post-decisional documents that should not form any basis for amending the petition because they do not fall within any of the exceptions the Board has recognized for record supplementation.[15] Powertech's Resp. to Mot. to Amend at 2, 7-8. In support, Powertech cites

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[15] The Tribe does not dispute that the cultural resources survey protocol for the Crow Butte Resources Facility, Fall River County ordinance, and three Preliminary Economic Assessments are post-decisional documents that were not available to the Region at the time it issued the UIC permits and thus are not a part of the administrative record as defined by the part 124 regulations. *See, e.g.,* Tribe's Add'l. Br. at 8. Under the part 124 regulations, the administrative record in a permit proceeding is deemed complete "on the date the final permit is

General Electric, where the Board found that post-decisional materials "cannot satisfy [the] criteria for supplementing the [administrative] record" because: (1) the part 124 regulations specify that the record closes when the permit is issued; and (2) "the Agency cannot possibly have relied upon" such material as it would "have come to the agency's attention after the permitting decision was already made." *In re Gen. Elec. Co*., 18 E.A.D. 575, 610 (EAB 2022), *pet. for review denied sub nom. Housatonic River Initiative v. EPA*, 75 F.4th 248 (1st Cir. 2023).

The Board has interpreted the part 124 administrative record provisions to mean that "documents submitted subsequent to permit issuance cannot be considered part of the administrative record," *In re Dominion Energy Brayton Point, LLC* ("*Dominion I*"), 12 E.A.D. 490, 518 (EAB 2006), unless: (1) the documents fall into a category of materials that must be included in the administrative record, *see* 40 C.F.R. § 124.18(b)(1)-(7); or (2) the Agency relied on the materials in its final permitting decision but failed to include them in the certified administrative record. *Gen. Elec. Co.*, 18 E.A.D. at 610. In addition, the Board may, under very narrow circumstances, consider post-decisional non-record information to allow a petitioner to question the validity of material the Region added to the administrative record in response to comments and to take official notice of relevant information that is publicly available and incontrovertible, such as statutes, regulations, judicial proceedings, public records, and Agency documents. *Id.* at 609-11.

The Tribe made no effort in its reply to explain how the post-decisional materials it proffers fall within any of the above exceptions that the Board has recognized, nor do we think

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issued," which in this case occurred on November 24, 2020. 40 C.F.R. § 124.18(c); *In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 518 (EAB 2006).

any of the post-decisional materials meet any of these exceptions.[16] *See generally* Tribe's Reply to Mot. to Amend. Following briefing of the motion to amend, we issued an order requiring the parties to address how Board consideration of the three post-decisional Preliminary Economic Assessment documents comport with the part 124 regulations that deem the record complete on the date the final permit is issued and Board precedent on supplementing the administrative record. Board's June 2023 Order at 2 (referencing the regulations at 40 C.F.R. §§ 124.9, .18(b) and (c)). In response, the Tribe addresses neither the part 124 regulations nor Board precedent. *See generally* Tribe's Add'l. Br. at 8-10. Instead, the Tribe appears to invite the Board to ignore the part 124 regulations, *id*. at 8, but we decline to do so.[17]

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[16] Instead of addressing the regulations at 40 C.F.R. §§ 124.9, .18(b) and (c), the Tribe's reply contends that section 124.19 "confirm[s] that a supplemental petition is properly based on evidence that came into existence after the permit issued, but before any party filed a response to the original petition." Tribe's Reply to Mot. to Amend at 3; *see also id.* at 3-4 (citing 40 C.F.R. § 124.19(a)(4), (b)(2), (*l*)). The part 124 regulations do not support this assertion. Section 124.19(a)(4), on which the Tribe relies, identifies what a petitioner must demonstrate in its petition to warrant Board review. The provision also provides that for issues not raised in the comment period, the petition must explain why those issues were not required to be raised under section 124.13. Nothing in section 124.19(a)(4) speaks to record supplementation. The Tribe also relies on section 124.19(b)(2), which sets forth the requirements for responses to a petition, including the requirement for the permitting authority to file a response to the petition, a certified index of the administrative record, and the relevant portions of the administrative record within thirty days after service of a petition. That the Region must submit a certified index of the administrative record with its response to the petition does not mean that the administrative record remains open until such response is filed, as such an approach would directly conflict with section 124.18(c). Finally, section 124.19(*l*) provides that a petition is a prerequisite to seeking judicial review and defines when "a final agency action" for purposes of judicial review occurs. The Tribe appears to conflate a final agency action that can be challenged in federal court, 40 C.F.R. § 124.19(*l*), with the date the Region issues a final permit, *id.* § 124.18(c), the latter of which occurred on November 24, 2020.

[17] The Tribe's additional briefing raises yet another new theory as to why it can supplement the petition at this stage of the proceedings. Tribe's Add'l. Br. at 7-10. It argues that the UIC regulations allow the Region "to reconsider suitability of a facility location where 'new

As we noted in *General Electric*, the Board's reluctance to consider post-decisional materials "is consistent with the administrative law principle that the 'record for an agency decision includes all documents, materials, and information that the agency relied on directly or indirectly in making its decision.'" *Gen. Elec. Co*., 18 E.A.D. at 608 (quoting *Dominion I*, 12 E.A.D. at 519)*; accord Housatonic River Initiative*, 75 F.4th at 278. Supporting a liberal approach to admission of post-decisional documents "reflect[s] a flawed understanding of the basic principles of administrative record review and the limited instances in which an administrative record may be supplemented on appeal." *Gen. Elec. Co*., 18 E.A.D. at 611 (quoting *In re Town of Newmarket*, 16 E.A.D. 182, 241 (EAB 2013)). As discussed above, no special circumstances exist here that would warrant us deviating from this Board precedent. *See* Part II.B.1.[18]

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information or standards indicate that a threat to human health or the environment exists which was unknown at the time of permit issuance,'" *id*. at 7, and contemplate Region "consideration of changing circumstances at a site, even after a permit is issued," *id*. at 9 (citing 40 C.F.R. § 144.39). But the Tribe's reliance on 40 C.F.R. § 144.39 is both untimely and misplaced. The Tribe's arguments assume that "material and substantial alterations or additions to the permitted facility" have occurred, *see* 40 C.F.R. § 144.39(a)(1), and that "a threat to human health or the environment exists," due to the alleged changes in circumstances, *see id*. § 144.39(c). But as demonstrated above, the events the Tribe identifies do not support these assumptions. *See* Part II.B.1. And, in any event, 40 C.F.R. § 144.39 addresses the process for a permitting authority to modify or revoke and reissue a permit, not amendment of a petition filed with the Board.

[18] In its brief in response to the Board's June 2023 Order, the Tribe argues that the Region's and Powertech's efforts to exclude the documents on which the Tribe now relies "has identified a larger question regarding the [Board's] use of procedures that do not allow the Tribe the rights of confrontation and cross examination in establishing the administrative record." Tribe's Add'l. Br. at 10. To the extent the Tribe seeks to challenge the part 124 regulation, it is well-settled that the Board generally does not consider challenges to EPA regulations. *See In re Muskegon Dev. Co*., 18 E.A.D. 88, 104-5 (EAB 2020).

III. *IMPACT OF THE D.C. CIRCUIT'S DECISION IN OGLALA SIOUX TRIBE AND ISSUES REMAINING FOR BOARD RESOLUTION*

In its June 2023 Order, the Board required the parties to address the impact of the D.C. Circuit's decision in *Oglala Sioux Tribe* on the issues raised in the petition and identify what remains for Board resolution. Board's June 2023 Order at 2. The Board sought input on the impact of *Oglala Sioux Tribe*, as the Board had stayed this matter pending disposition of that case. *See* Order Granting Motion to Stay Subject to Conditions 4-5 (June 10, 2021).

In their briefs responding to the June 2023 Order, the parties agree that the D.C. Circuit's decision in *Oglala Sioux Tribe* is not determinative for the following issues raised in the petition and that these issues remain for Board resolution: the National Environmental Policy Act ("NEPA") claim, Pet. at 23-33, the SDWA claim, Pet. at 34-45, and the Administrative Procedure Act claim, Pet. at 45-52. Tribe's Add'l. Br. at 5; Region's Add'l. Br. at 7; Powertech's Add'l. Br. at 3. The parties disagree, however, with respect to the impact of *Oglala Sioux Tribe* on the NHPA section 106 issue raised in the petition. Tribe's Add'l. Br. at 2-5; Region's Add'l. Br. at 2-7; Powertech's Add'l. Br. at 2-3.

For the reasons discussed below, we conclude that the Tribe's NHPA section 106 claim is no longer at issue given the D.C. Circuit's decision in *Oglala Sioux Tribe* and the Region's compliance with section 106, and therefore deny that aspect of the petition. The Board will separately issue a scheduling order directing the parties to brief the issues remaining for Board resolution and setting an oral argument date for those issues.[19]

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[19] Powertech suggests that the NEPA claim will be resolved when the Board rules on its pending motion to strike the NEPA challenges. Powertech's Add'l. Br. at 3. As discussed in the scheduling order issued today, that motion was filed at a time when proceedings in this matter

A. *Statutory and Regulatory Framework*

NHPA section 106 requires federal agencies that have licensing authority for an undertaking to "take into account the effect of the undertaking on any historic property" prior to issuance of any license. NHPA § 106, 54 U.S.C. § 306108. Consistent with Congress' direction, the Advisory Council on Historic Preservation issued regulations implementing section 106. NHPA § 211, 54 U.S.C. § 304108; *see generally* 36 C.F.R. pt. 800. Those regulations set forth procedures for federal agencies to follow in considering the effect of their undertakings on properties included, or eligible for inclusion, on the National Register of Historic Places. 36 C.F.R. pt. 800.

Prior to issuing a license or permit, the part 800 regulations require an agency to "consult with any Indian tribe * * * that attaches religious and cultural significance to historic properties that may be affected by an undertaking," *id*. § 800.2(c)(2)(ii), and provide the tribe a "reasonable opportunity" to identify any concerns about historic properties, "advise on the identification and evaluation of [such] properties," and participate in resolving any adverse effects, *id*. § 800.2(c)(2)(ii)(A). *See also id.* § 800.1(c). Where more than one federal agency is involved in an undertaking, the regulations allow a federal agency to designate a lead federal agency for purposes of NHPA section 106 compliance. *Id.* § 800.2(a)(2). The NHPA section 106 process

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were stayed. Order Scheduling Briefing and Oral Argument (Nov. 16, 2023). The Board has determined that it would be more effective and efficient for the parties to address the issues raised in the pending motions through their respective response and reply briefs, and not through further briefing on the motions. *Id*.; *see also* 40 C.F.R. § 124.19(n). This approach is consistent with the Board's June 2, 2021 Order. Order Regarding Additional Pleadings 2 (June 2, 2021).

culminates in an agreement that specifies how adverse effects on historic properties will be avoided, minimized, or mitigated. *Id*. §§ 800.6(c), .14(a)-(b).

B. *The Region Has Met Its NHPA Section 106 Obligations*

In its petition, the Tribe asserts that the Region failed to meet its obligations under NHPA section 106. Pet. at 14-21. The Tribe argues that "[t]he administrative record, including EPA's decision documents and EPA's Response to Comments," shows that the Region "failed to comply with the consultation and historic resources protection requirements of the NHPA" because "there has never been a competent Lakota cultural resources survey of the Dewey-Burdock site." *Id*. at 16. The Tribe also maintains that the Region signed on to the Programmatic Agreement "in an attempt to fulfill its NHPA duties," but claims that the Region "cannot lawfully rely on NRC Staff's legally infirm NHPA * * * efforts" with regard to the identification of cultural resources, arguing that the survey conducted by the NRC is "discredited." *Id*. at 20-21 (asserting that a Programmatic Agreement "that lacks the support of a competent survey does not legally suffice"). In its additional briefing, the Tribe advocates that the issue remains for Board review. Tribe's Add'l. Br. at 2-5. We disagree.

Our analysis begins with 36 C.F.R. § 800.2(a)(2). This section unambiguously provides that where one or more federal agencies are involved in an undertaking, any of those agencies can designate a lead federal agency and that lead agency "shall act on [the designating agencies'] behalf, *fulfilling their collective responsibilities under [NHPA] section 106*." 36 C.F.R. § 800.2(a)(2) (emphasis added). Section 800.2(a)(2) further provides that agencies that decline to designate a lead federal agency "remain individually responsible for their compliance" with the NHPA section 106 regulations. *Id*. Section 800.2(a)(2) thus presents a clear dichotomy as to NHPA section 106 compliance: a federal agency can, as the Region did here, designate a lead

federal agency and agree to have that lead agency act on its behalf and be bound by the lead agency's compliance or noncompliance with NHPA section 106, or it can decline to designate a lead agency and comply on its own with NHPA section 106.

Our reading of the regulatory text is reinforced by statements of the Advisory Council on Historic Preservation, which provide that "if the lead agency correctly complies with Section 106, the non-lead agency is also in compliance with Section 106." Advisory Council on Historic Preservation, *Frequently Asked Questions About Lead Federal Agencies in Section 106 Review,* https://www.achp.gov/digital-library-section-106-landing/frequently-asked-questions-about-lead-federal-agencies (last visited Nov. 16, 2023). Similarly, "if the lead agency is in non-compliance with Section 106, so is the agency that designated it as lead." *Id.*

Here, the Region designated the NRC as the lead federal agency for NHPA section 106 compliance purposes for the Dewey-Burdock project, and the Tribe fully litigated the NRC's compliance with the NHPA in the D.C. Circuit. *See* Resp. to Cmts. at 309-311 (Cmt. #263); Region's NHPA Lead Agency Letter at 1; EPA Signature Page; *Oglala Sioux Tribe*, 45 F.4th at 306. The D.C. Circuit denied the Tribe's petition, finding, among other things, that the NRC had satisfied its NHPA statutory and regulatory obligations for the Dewey-Burdock project. *Oglala Sioux Tribe*, 45 F.4th at 306. The D.C. Circuit found that the NRC satisfied its consultation obligations under the NHPA, explaining that the NRC had engaged with the Tribe for over a two-year period and that "[t]he Tribe's refusal to participate in the 2013 Survey and its challenges to the agency's methodology d[id] not vitiate the reasonable opportunity the Tribe was, in fact, afforded." *Id*. The D.C. Circuit also rejected the Tribe's argument that the NRC had "impermissibly failed to survey the Dewey-Burdock area for the Tribe's historic properties," holding that an agency can satisfy its NHPA obligations "without conducting a survey or

conducting it in a specific way." *Id*. Finally, the D.C. Circuit rejected the Tribe's argument that the NRC had "impermissibly postponed identifying historic properties until after Powertech had begun operations," finding that the NHPA regulations "expressly contemplate this approach" and allow for a phased identification and evaluation of historic properties through a programmatic agreement "'[w]hen effects on historic properties cannot be fully determined prior to approval of an undertaking.'" *Id.* (quoting 36 C.F.R. § 800.14(b)(1)(ii)).

With the D.C. Circuit conclusively determining NRC's compliance with NHPA section 106 and the NRC serving as the lead federal agency for the Dewey-Burdock project under 36 C.F.R. § 800.2(a)(2), it necessarily follows that the Region too has satisfied its obligations under NHPA section 106. After the D.C. Circuit's decision in *Oglala Sioux Tribe*, there simply is no issue remaining for the Board to adjudicate as to whether the Region met its obligations under NHPA section 106. To conclude otherwise would be inconsistent with the lead federal agency provision of 36 C.F.R. § 800.2(a)(2) and stipulation 7 of the Programmatic Agreement.[20]

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[20] The Tribe previously explained to the Board that "any decision in the D.C. Circuit case 'would have a significant effect on these proceedings,' regardless of who prevails." Reply to Powertech (USA) Inc. Response in Opposition to EPA Motion to Stay Proceedings 1 (May 28, 2021) ("Tribe Stay Reply") (quoting Status Report and Motion for Stay of Proceedings 4 (Apr. 19, 2021)). It now claims otherwise, arguing that "[t]he 'crucial' NHPA decision under review [in the D.C. Circuit] did not involve the EPA," that the Court only fully resolved the NHPA questions as applied to the NRC, and that the Region did not intervene in the D.C. Circuit case. Tribe's Add'l. Br. at 1-2, 4. As discussed above, the Tribe's arguments cannot be reconciled with the unambiguous language of section 800.2(a)(2). Indeed, the Tribe recognized as much in supporting the Region's request for a stay, when it remarked on "the Region's legally supported demonstration" that "[i]f the lead agency is in non-compliance with [NHPA] Section 106, so is the agency that designated it as lead." Tribe Stay Reply at 4. The converse is equally true under the express terms of 36 C.F.R. § 800.2(a)(2) — if the lead agency is in compliance with NHPA Section 106, so is the agency that designated it as lead. And that conclusion does not depend on whether the Region intervened in *Oglala Sioux Tribe*. The Tribe also fails to recognize that the

In its response to the June 2023 Order, the Tribe addresses 36 C.F.R. § 800.2(a)(2), and argues that there is no record demonstrating that "the Region took the necessary steps, at the correct time, as required to avoid remaining 'individually responsible for [the Region's] compliance' with [the] NHPA."[21] Tribe's Add'l. Br. at 3 (first alteration in original) (quoting 36 C.F.R. § 800.2(a)(2)). The petition for review does not raise this argument, and it cannot be raised now. *See* 40 C.F.R. §§ 124.19(a)(4)(ii), (c)(2); *see also, In re City of Keene*, 18 E.A.D. 720, 746 (EAB 2022). But even if we were to consider that argument, we would conclude that the Region's actions comply with the regulation. *See* 36 C.F.R. § 800.2(a)(2).

The Tribe relies on a portion of the Advisory Council on Historic Preservation's response to a Frequently Asked Question to assert that the designation must be done "as early as possible in the Section 106 review process," alleging the Region's designation is flawed, but the Tribe ignores the remainder of that response and the public record for these permits. Advisory Council on Historic Preservation, *Frequently Asked Questions About Lead Federal Agencies in Section 106 Review*, https://www.achp.gov/digital-library-section-106-landing/frequently-asked-questions-about-lead-federal-agencies (last visited Nov. 16, 2023). In that response, the Advisory Council on Historic Preservation addresses the need to identify whether other federal agencies are likely to be responsible for issuing licenses for the undertaking and to begin

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United States was a party to the *Oglala Sioux Tribe* case and represented by the United States Department of Justice.

[21] By this argument, the Tribe acknowledges the distinction set forth in section 800.2(a)(2), between agencies that designate a lead agency, as the Region did here, where the lead agency acts on behalf of the designating agencies and fulfills their collective responsibilities under NHPA section 106, and those that do not and remain individually liable for compliance with that section.

communicating about respective roles and whether a lead agency might be designated for NHPA section 106 review.[22] *Id.* That is what occurred here. The Programmatic Agreement, dated March 19, 2014, confirms that the NRC, the Bureau of Land Management, and the Region participated in the discussions about the Agreement, and that the Agreement was developed "to take into account the effects of the [Dewey-Burdock project] undertaking on historic properties." Resp. to Cmts. at 310 (Cmt. #263) (quoting Programmatic Agreement at 4). Stipulation 7 of the Programmatic Agreement expressly states that "[a]ny federal agency that will provide approvals or assistance for the undertaking as presently proposed may comply with its Section 106 responsibilities for the undertaking by agreeing to the terms of this [Programmatic Agreement] in writing and sending copies of such written agreement to all the signatories and consulting parties of this [Agreement]." Resp. to Cmts. at 310 (Cmt. #263); Programmatic Agreement at 10.

The record further reflects that in August 2019 the Region discussed the possibility of designating the NRC as the lead federal agency and signing the Programmatic Agreement and received comments on that approach. Resp. to Cmts. at 310 (Cmt. #263). Indeed, the Tribe submitted comments on December 9, 2019, challenging EPA's proposal to do so, arguing "the

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[22] In addressing "When should a lead federal agency be designated?," the Advisory Council on Historic Preservation stated that: "A lead federal agency should be designated as early as possible in the Section 106 review process. Once an agency determines it has an undertaking with the potential to affect historic properties, it should also determine whether other federal agencies are likely to be responsible for carrying out the undertaking or issuing licenses, permits, approvals, or assistance for it. If so, the agencies should begin communicating about their respective roles and responsibilities and discuss whether a lead federal agency might be designated for the purpose of Section 106 review." Advisory Council on Historic Preservation, *Frequently Asked Questions About Lead Federal Agencies in Section 106 Review*, https://www.achp.gov/digital-library-section-106-landing/frequently-asked-questions-about-lead-federal-agencies (last visited Nov. 16, 2023).

lack of a competent cultural resources survey has poisoned the Programmatic Agreement such that it is not a viable means for NHPA compliance." Pet., attach. 2 at 7. The Region considered the comments received on NHPA section 106 compliance, adequately explained in its response to comments its basis for designating the NRC as the lead federal agency under section 800.2(a)(2), signed the Programmatic Agreement, agreeing to its terms, and provided that signature to the other parties consistent with stipulation 7 of the Agreement.[23] Resp. to Cmts. at 311 (Cmt. #263); Region's NHPA Lead Agency Letter at 1; EPA Signature Page. The Board finds that the Region properly availed itself of the lead federal agency option under section 800.2(a)(2). As such, contrary to the Tribe's argument, the Region did not remain "individually responsible" for compliance with NHPA section 106. There is no further record development needed; NRC is the lead federal agency for NHPA section 106 compliance, as designated by the Region.[24]

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[23] The Board also rejects the Tribe's argument that the Region "provides no administrative record besides a 'Response to Comments'" to support its designation of the NRC as lead agency. Tribe's Add'l. Br. at 2. As the Board has emphasized, the response to comments "provides the Agency's final rationale for its decision," and, consistent with the part 124 regulations, is a critical component of the administrative record supporting the final permit. *In re ConocoPhillips Co.*, 13 E.A.D. 768, 780 (EAB 2008) (*quoting Dominion I*, 12 E.A.D. at 533); 40 C.F.R. § 124.18; *see also* Resp. to Cmts. at 309-311 (Cmt. # 263); Region's NHPA Lead Agency Letter; EPA Signature Page.

[24] In a final attempt to distinguish *Oglala Sioux Tribe*, the Tribe claims that the case "does not resolve the geographic scope issues implicated by a Programmatic Agreement that is limited to 'the Dewey-Burdock Project site and its immediate environs.'" Tribe's Add'l. Br. at 3 (quoting Programmatic Agreement at 2). This challenge concerns the Programmatic Agreement, and it comes too late. *See* Tribe Stay Reply at 4 (stating that "the efficacy and legality of the Programmatic Agreement" is "directly at issue in the D.C. Circuit."). The Tribe cannot through this proceeding launch new attacks on the NRC's section 106 compliance efforts for the Dewey-Burdock project. The NRC's efforts were lawful and thus so were the Region's. *See Oglala Sioux Tribe*, 45 F.3d at 306; 36 C.F.R. § 800.2(a)(2).

Finally, we agree with the Region that the Tribe's NHPA section 106 claim is also precluded under the collateral estoppel doctrine. *See* Region's Add'l. Br. at 4-5. Collateral estoppel, or issue preclusion, "precludes a party from relitigating an issue actually decided in a prior case and necessary to the judgment." *Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp., Inc*., 140 S. Ct. 1589, 1594 (2020); *Yamaha Corp. of America v. U.S.*, 961 F.2d 245, 254 (D.C. Cir. 1992) ("'[O]nce a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.'" (quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980))). In analyzing collateral estoppel in this case, we look to the law of the D.C. Circuit, which provides that a party is barred from relitigating an issue if the following conditions are met: (1) the same issue being raised in the subsequent case must have been contested by the parties and submitted for judicial determination in the prior case; (2) the issue "must have been actually and necessarily determined by a court of competent jurisdiction in that prior case"; and (3) "preclusion in the second case must not work a basic unfairness to the party bound by the first determination." *Yamaha*, 961 F.2d at 254; *see, e.g., In re Marine Shale Processors, Inc.*, 5 E.A.D. 751, 775 (EAB 1995) (following collateral estoppel doctrine of the forum in which issue was originally resolved), *aff'd*, 81 F.3d 1371 (5th Cir. 1996); *In re Harmon Elecs., Inc.,* 7 E.A.D. 1, 11 (EAB 1997) (similar), *rev'd sub nom. Harmon Indus., Inc. v. Browner*, 19 F. Supp. 2d 988 (W.D. Mo. 1998), *aff'd*, 191 F.3d 894 (8th Cir. 1999).

Each of these requirements is met here. First, the Tribe and the United States litigated the NRC's compliance with NHPA section 106 before the D.C. Circuit and submitted the issue for resolution to the D.C. Circuit, and as established above, the NRC acted on the Region's behalf under 36 C.F.R. § 800.2(a)(2) for NHPA section 106 compliance purposes. Second, the D.C.

Circuit ruled against the Tribe in a final judgment. *See Oglala Sioux Tribe*, 45 F.4th at 306. Finally, preclusion would not work a basic unfairness to the Tribe. The Tribe was the petitioner in the D.C. Circuit action and had a "full and fair opportunity" to litigate the NHPA section 106 compliance question. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 333 (1979) (holding that collateral estoppel "inescapably" bound petitioners who had a "'full and fair' opportunity to litigate their issues"). For these reasons, collateral estoppel poses a bar to the Tribe re-litigating the issue of NHPA section 106 compliance for the Dewey-Burdock project before the Board.

Accordingly, the Board denies the NHPA section 106 issue raised in the Tribe's petition.[25]

C. *Issues Remaining for Board Resolution*

Based on the foregoing, four issues remain for Board resolution: the reference in the petition to NHPA section 110, *see* Pet. at 22; the NEPA claim, Pet. at 23-33; the SDWA claim, Pet. at 34-45; and the Administrative Procedure Act claim, Pet. at 45-52. As noted above, the

[25] The Tribe's petition for review contains a passing reference to NHPA section 110, stating that "[i]n addition to Section 106 NHPA duties, NHPA Section 110 also ensures proper identification and evaluation of cultural resources," and that "[t]hese duties extend beyond those imposed by the section 106 consultation process and cannot be satisfied by mere outreach letters." Pet. at 22. It is not clear on the face of the petition whether the Tribe is asserting that the Region violated NHPA section 110, or how, in fact, it violated that section. The Region addresses the reference to NHPA section 110 in a footnote in its brief responding to the June 2023 Order. Region's Add'l. Br. at 6 n.3. Powertech does not reference NHPA section 110 in its brief responding to the June 2023 Order but maintains that *Oglala Sioux Tribe* resolved "the NHPA issues." Powertech's Add'l. Br. at 3. The Board is not addressing the merits of the reference to NHPA section 110 today and directs the parties to brief the NHPA section 110 matter as presented in the petition for review in the responses to the petition, and reply brief, if one is filed. The Board reminds the Tribe that new arguments cannot be raised in a reply. 40 C.F.R. § 124.19(a)(4), (c)(2).

Board will separately issue a scheduling order that directs the parties to brief these issues and sets an oral argument date.

IV. *CONCLUSION*

For the foregoing reasons, the Board denies the Tribe's motion to amend its petition and denies review on the NHPA section 106 issue raised in the petition.[26] The parties are directed to address the remaining issues for Board resolution, as identified in Part III.C. above, consistent with the requirements set forth in the scheduling order.[27]

So ordered.[28]

ENVIRONMENTAL APPEALS BOARD

Dated: Nov 16, 2023

By: _____
Wendy L. Blake
Environmental Appeals Judge

[26] We have considered all the arguments in the motion to amend, the briefs in response to the Board's June 2023 Order, and the petition on the NHPA section 106 issue, whether or not they are specifically discussed in this order.

[27] The Board's decision on the NHPA section 106 issue in this order will be incorporated into the Board's final order resolving the remaining issues raised in the petition for review.

[28] The three-member panel deciding this matter is composed of Environmental Appeals Judges Aaron P. Avila, Wendy L. Blake, and Mary Kay Lynch.

CERTIFICATE OF SERVICE

I certify that copies of the foregoing *Order Denying Motion to Amend Petition for Review, Denying Review on the Petition's National Historic Preservation Act Section 106 Issue, and Identifying Issues in the Petition Remaining for Resolution,* in the matter of Powertech (USA) Inc., UIC Appeal No. 20-01, were sent to the following persons in the manner indicated.

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