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

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

RESPONSE OF POWERTECH (USA) INC.
TO PETITION FOR REVIEW

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Pursuant to 40 C.F.R. § 124.19(b), Powertech (USA) Inc. ("Powertech") hereby responds to the petition for review in the above-captioned matter (the "Petition"). Powertech is the permittee of the Underground Injection Control ("UIC") permits that are the subject of the Petition. For the reasons stated in this response, the Petition should be denied.

Factual Background

Respondent, U.S. Environmental Protection Agency Region VIII ("EPA" or "Region"), granted Powertech the UIC permits at issue (the "Permits") for an in-situ recovery ("ISR") uranium mining operation in South Dakota (the "Dewey-Burdock Project"). The ISR process allows uranium to be produced without the need to excavate the subsurface, uranium-containing ore for processing. To accomplish this, Powertech would use Class III wells to pump out groundwater from the ore zone, fortify the groundwater with oxygen to create a lixiviant solution and reinject the fortified groundwater back into the ore zone where uranium in the ore zone would dissolve and form a complex with naturally occurring sodium bicarbonates (essentially baking soda) in solution creating a "rich" lixiviant, which would then be brought back to the surface for uranium recovery. When the uranium has been removed using an ion exchange system, similar to a home water softener system, from the "rich" lixiviant, this "barren" lixiviant would then be filtered, and with oxygen readded, reinjected back into the ore zone to recover more uranium.[1]

As a result, the bulk of the fluid used in the operation would stay in what amounts to a continuous circuit in which it is repeatedly injected into the subsurface, pumped back out, processed to remove uranium, and re-injected. Only a small fraction of the groundwater exits this

[1] *See* Attachment 1: Fact Sheet, Powertech (USA) Inc. Dewey-Burdock Class III Injection Wells, Custer and Fall River Counties, South Dakota, EPA Permit No. SD31231-00000 at 97 (EPA-R08-2019-0512-0226).

circuit in the form of wastewater from the processing operations that would be reconditioned to meet conditions as good or better than existing groundwater, and reinjected using Class V wells into a separate geologic formation far below the formation from which uranium would be produced. One of the Permits (No. SD31231-0000) authorizes the "Class III" injection wells that would be used to remove and inject the lixiviant into the targeted formation for uranium production; the other (No. SD52173-00000) authorizes the "Class V" wells that would be used for wastewater disposal.

ISR is a relatively common mining technique, used in uranium mining in the United States for more than 30 years. While the Dewey-Burdock Project would apparently be the first ISR uranium mining operation in South Dakota, such operations have occurred in several other states, including the neighboring states of Nebraska and Wyoming. Such operations are subject to comprehensive regulation by the Nuclear Regulatory Commission ("NRC") pursuant to the Atomic Energy Act of 1954, 42 U.S.C. § 2011 *et seq*., and the injection wells used in ISR operations are also subject to UIC Program regulations implementing the Safe Drinking Water Act ("SDWA"), 42 U.S.C. § 300f *et seq*. While many states have obtained authorization to implement their own UIC programs in accordance with Federal minimum standards, EPA Region VIII, which issued the Permits, directly implements the UIC Program for Class III and Class V wells in South Dakota.

The Permits here, resulted after a lengthy regulatory process conducted in tandem with the even lengthier and more comprehensive NRC licensing process for the Dewey-Burdock Project. The Region published the two draft UIC permits on March 6, 2017, extending the comment period through June 19, 2017, and holding a series of public hearings in April and May 2017. *See* Response to Comments ("RTC") at 2 (Attachment 35 to the Petition). Based on its

review of public comments, the Region "determined it would be appropriate to update the Class III and Class V draft area permits and associated documents and provide another opportunity for public notice and comment." *Id.* The Region published and took comment on an updated draft UIC permits on August 26, 2019, and held another public hearing on October 5, 2019. *Id.* at 3. With the final permits, the Region issued an over-500-page RTC that addresses the comments received and provides robust support for the Region's permit determinations.

Petitioner seeks review of the Permits. By order dated November 16, 2023, the Board denied the National Historic Preservation Act ("NHPA") section 106 issue raised in the petition. 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 (Nov. 16, 2023). In the same Order, the Board stated: "four issues remain for Board resolution: the reference in the petition to NHPA section 110, *see* Petition at 22; the [National Environmental Policy Act ("NEPA")] claim, Petition at 23-33; the SDWA claim, Petition at 34-45; and the Administrative Procedure Act ["APA"] claim, Petition at 45-52." This response addresses these remaining issues and the Brief Amicus Curiae of the Great Plains Tribal Water Alliance, Inc. ("Alliance"). None of the issues raised by Petitioner or Amicus Curiae warrant review.

Scope and Standard of Review

The Board's consideration of petitions for review of UIC permits is guided by the principles that "the Board's power of review 'should be only sparingly exercised'" and that "the burden of demonstrating that review is warranted rests with the petitioner." *In re Envtl. Disposal Sys., Inc.*, 12 E.A.D. 254, 263-64 (EAB 2005) (*quoting* 45 Fed. Reg. 33,290, 33,412 (May 19, 1980)).

As a threshold requirement, petitions for review of permit decisions must show that each issue raised has been preserved for review; specifically, the Petitioner must demonstrate that the issues and arguments it seeks to raise on appeal were raised in comments submitted on the draft permit or at a public hearing. *In re Ariz. Pub. Serv. Co.*, 18 E.A.D. 245, 250 (EAB 2020) (*citing In re Gen. Electric Co.*, 17 E.A.D. 434, 464 (EAB 2018)). In addition, the Petitioner "must demonstrate that each challenge to the permit decision is based on a finding of fact or conclusion of law that is clearly erroneous." 40 C.F.R. § 124.19(a)(4)(i)(A). To satisfy that standard, "it is not enough to merely cite or reiterate comments previously submitted on the draft permit." *Ariz. Pub. Serv.*, 18 E.A.D. at 251 (*citing In re City of Taunton Dep't of Pub. Works*, 17 E.A.D. 105, 111 (EAB 2016), *aff'd*, 895 F.3d 120 (1st Cir. 2018), *cert. denied*, 139 S. Ct. 1240 (2019)). Instead, "the petitioner must demonstrate, with factual and legal support, why the Region's response to comments on the issue raised is clearly erroneous or otherwise warrants review." *Ariz. Pub. Service*, 18 E.A.D. at 251 (*citing* 40 C.F.R. § 124.19(a)(4)(i); *see, e.g., In re Seneca Res. Corp.*, 16 E.A.D. 411, 416 (EAB 2014)). The regulations governing Board review of UIC permits state that the petitioner "must demonstrate, by providing specific citation or other appropriate reference to the administrative record by including the document name and page number, that each issue being raised in the petition was raised during the public comment period (including any public hearing)." 40 C.F.R. § 124.19(a)(4)(ii). In addition, where issues have been addressed in the Region's RTC, the regulations specify that "petitioner must provide a citation to the relevant comment and response and explain why the Regional Administrator's response to the comment was clearly erroneous or otherwise warrants review." *Id*.

The scope of the Board's review is also limited by the long-established principle that "parties objecting to a federally issued UIC permit must base their objections on the criteria set

forth in [the SDWA] and its implementing regulations." *In re Brine Disposal Well, Montmorency Cnty., Mich.*, 4 E.A.D. 736, 742 (EAB 1993). Challenges to UIC permits must therefore "pertain exclusively to the UIC program and its focus on protecting underground sources of drinking water from possible harm caused by underground injection activities." *In re Jordan Dev. Co.*, 18 E.A.D. 1, 11 (EAB 2019); *see In re Envtl. Disposal Sys., Inc.*, 12 E.A.D. 254, 266 (EAB 2005) (the Board's "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"); *In re Am. Soda, L.L.P.*, 9 E.A.D. 280, 286 (EAB 2000) ("the SDWA and the UIC regulations authorize the Board to review UIC permitting decisions only as they affect a well's compliance with the SDWA and applicable UIC regulations"); *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 567 (EAB 1998) ("protection of interests outside of the UIC program [is] beyond our authority to review in the context of [a UIC] case"), *review denied sub nom. Penn Fuel Gas, Inc. v. U.S. EPA*, 185 F.3d 862 (3d Cir. 1999).

Argument

The Board should deny Petitioner's request for review of the Permits. The Region reasonably set the terms and conditions of the Permits, taking into account the concerns Petitioner raised in its comments. Across the board, Petitioner fails to demonstrate that the Permits' terms and conditions are based on clearly erroneous findings of fact and conclusions of law, or otherwise warrant review. Petitioner also fails to "provid[e] specific citation or other appropriate reference to the administrative record" to show that "each issue being raised in the petition was raised during the public comment period," 40 C.F.R. § 124.19(a)(4)(ii), largely ignoring the Region's robust record and RTC, which support the Region's determinations. Instead, the Petition simply states that "as discussed infra, both sets of comments submitted by Petitioner in 2017 and 2019 detail" the Region's alleged failure to comply with various NEPA,

NHPA, SDWA, and APA requirements. Petition at 11. The subsequent "discussion" in the Petition provides citations in support of the arguments presented, but generally does not provide citations demonstrating that specific arguments were raised during the public comment period or explaining why the Region's RTC on the relevant issues was clearly erroneous. Accordingly, Powertech respectfully requests the Board deny the Petition.

I. The Board Should Deny Review of the Petition's NEPA Claims.

The Petition urges the Board to entertain a challenge to the Region's compliance with NEPA requirements, but such claims are not properly before the Board. All such challenges are explicitly excluded by 40 C.F.R. § 124.9(b)(6), which provides that UIC permits "are not subject to the environmental impact statement provisions of § 102(2)(C) of [NEPA]."

In its RTC, EPA summarized the NEPA challenges presented during the public comment process as follows:

> EPA received comments regarding EPA's compliance with [NEPA] and EPA's compliance with NEPA's implementing regulations. EPA also received comments regarding statutory and regulatory exemptions for EPA compliance with NEPA. In addition, EPA received comments regarding the applicability of the doctrine of NEPA functional equivalency to EPA, the legal basis for the NEPA functional equivalence doctrine, and EPA's compliance with the NEPA functional equivalence doctrine. EPA also received comments regarding the Nuclear Regulatory Commission (NRC)'s NEPA analysis.

RTC #264 at 312. The Petition merely repeats these comments.

As EPA already stated in its response:

> EPA determined that its action on Powertech's applications for Class III and Class V [UIC] permits and the aquifer exemption pursuant to SDWA is exempt from NEPA consistent with EPA's longstanding view, as well as the U.S. Court of Appeals for the 8th Circuit's decision in *W. Neb. Res. Council v. U.S. E.P.A.*, 943 F.2d 867 (8th Cir. 1991) and other relevant NEPA case law. EPA did not need to conduct a formal NEPA analysis prior to making its SDWA decisions on Powertech's applications for the UIC permits and aquifer exemption. October 23, 2020, Memo from Sarah Bahrman, Chief, Drinking Water Branch, EPA Region 8 to the File. …

> the courts have found EPA to be exempt from the procedural requirements of NEPA for certain actions under multiple statutes, including SDWA. . . .
>
> The U.S. Court of Appeals for the 8th Circuit found the SDWA is the functional equivalent of NEPA and therefore formal NEPA compliance is not required by EPA when the Agency takes action pursuant to the SDWA. *W. Neb. Res. Council v. U.S.E.P.A.*, 943 F.2d 867 (8th Cir. 1991). . .

Id. at 312-16. EPA's response further explained that it consolidated permitting regulations at 40 C.F.R. § 124.9(b)(6), promulgated in 1980 to exempt UIC permitting actions from NEPA, and that in promulgating this regulation, EPA's preamble to the final rule specifically states that NEPA does not require the preparation of an environmental impact statement ("EIS") for the UIC program. *Id*. at 313-14. EPA further explained that "No comments opposing this position were received, and a number of comments supported it." *Id*. at 314. In addition, EPA cited a long line of Board decisions upholding the application of this regulatory exemption from permitting decisions. *Id*.

The Petition fails to provide any explanation why EPA's response and its reliance on the regulation and judicial precedent, as well as the other supporting materials cited by EPA in the remainder of its response (RTC #264) are clearly erroneous. That amounts to a fatal flaw and supports denying review of the Petition's NEPA challenges.

A. NEPA Challenges Are Not Properly Before the Board.

The short and sufficient answer to all of Petitioners' NEPA claims is that the Board, in reviewing UIC permits, has no jurisdiction to review alleged deficiencies in NEPA compliance. *In re Am. Soda*, LLP, 9 E.A.D. 280, 290-91 (2000). The reason for this is straight-forward: "the SDWA and the UIC regulations authorize the Board to review UIC permitting decisions only as they affect a well's compliance with the SDWA and applicable UIC regulations," *id.* at 286, and those regulations specifically provide that UIC permits "are not subject to the environmental impact statement provisions of § 102(2)(C) of the [NEPA]." 40 C.F.R. § 124.9(b)(6).

The plain text of 40 C.F.R. § 124.9(b)(6) is dispositive of the NEPA issues. Petitioner seeks to ignore that regulation, apparently suggesting that – instead of meaning what it says – it authorizes the Board to apply the "functional equivalence" doctrine in the context of individual UIC permit decisions to determine whether NEPA compliance is required. *See* Petition at 24. This suggestion lacks merit. If the intent of the rule had been to charge the Board with the task of applying the "functional equivalence" doctrine to UIC permit decisions on a case-by-case basis, its text would have said something to the effect that UIC permits "may be subject to" NEPA requirements instead of flatly stating that they "are not." Nevertheless, the Petition goes on to argue that Permits are not exempt from NEPA requirements under the "functional equivalence" doctrine. There are at least three independently sufficient reasons to reject this line of argument.

First, the Petition does not effectively contest the Region's reliance on the applicable regulation: 40 C.F.R. § 124.9(b)(6). The Region's RTC explained that "UIC permits are exempt from NEPA pursuant to 40 C.F.R. § 124.9(b)(6) as well as the functional equivalence doctrine," RTC #264 at 315, and "[u]nder the plain language of this regulatory provision" NEPA compliance was not required. *Am. Soda*, 9 E.A.D. at 291-92. The Petition fails to "explain why" the Region's stated reliance on the regulation itself "was clearly erroneous or otherwise warrants review," 40 C.F.R. § 124.19(a)(4)(ii), and this "failure to address the permit issuer's response to comments" is, by itself, "fatal to" Petitioner's NEPA claims. *In re Indeck-Elwood, LLC*, 13 E.A.D. 126, 170 (EAB 2006).

Second, 40 C.F.R. § 124.9(b)(6) is "dispositive on the question of the UIC permit program's functional equivalence to NEPA." *Am. Soda*, 9 E.A.D. at 291. The Petition's foray into the "functional equivalence" doctrine is a collateral attack on that regulation, and the Board is not a proper forum for challenges to EPA regulations. *In re Archer Daniels Midland Co.*,

17 E.A.D. 380, 404-05 (EAB 2017); *In re FutureGen Indus. All., Inc*., 16 E.A.D. 717, 724 (EAB 2015), pet. for review dismissed as moot sub nom. *DJL Farm L.L.C. v. EPA*, 813 F.3d 1048 (7th Cir. 2016); *In re Tondu Energy Co*., 9 E.A.D. 710, 716 n.10 (EAB 2001). Petitioner's "functional equivalence" arguments should be rejected for this reason. *See Am. Soda*, 9 E.A.D. at 292 n.13 (declining to consider a collateral attack on 40 C.F.R. § 124.9(b)(6) in the context of a UIC permit appeal) (citing *In re Woodkiln, Inc*., 7 E.A.D. 254, 269 (EAB 1997); *In re Suckla Farms, Inc*., 4 E.A.D. 686, 698 (EAB 1993).

Third, Petitioner's arguments concerning the "functional equivalence" doctrine fail for the simple reason that they are contrary to binding judicial and administrative precedent that the Region cited in its RTC. *See* RTC #264 at 313-14 citing *W. Neb. Res. Council v. EPA*, 943 F.2d 867, 872 (8th Cir. 1991), *Am. Soda*, 9 E.A.D. at 290-92, *In re Beeland Group, LLC*, 14 E.A.D. 189, 205-06 (EAB 2008); *In re Windfall Oil & Gas, Inc*., 16 E.A.D. 769, 811 (EAB 2015). The Petition did not present any good faith argument that this precedent should be overturned or that the Region committed any error in relying upon it; it simply presented its arguments as though substantial contrary precedent did not exist. This inexplicable failure to address the Region's RTC raising of NEPA compliance issues is also fatal to Petitioner's NEPA claims. *In re Indeck-Elwood*, LLC, 13 E.A.D. 126, 170 (EAB 2006).

B. UIC Requirements for Review of Injection Well Cumulative Effects Do Not Implicate NEPA.

The Petition implies that the "cumulative effects" requirement of § 144.33(c)(3) demonstrates a requirement for NEPA review, Petition at 25-26, but this provision does not relate to NEPA and instead requires that EPA consider the additional contributions of future wells that could be constructed pursuant to an area permit within the specifically defined area of

review ("AoR").[2] As the Region explained, "Our only role under the SDWA is to consider this issue to determine whether effects related to the drilling and operation of additional injection wells are acceptable. *See* 40 C.F.R. § 144.33(c)(3)." RTC #269, at 318. Other issues required to be addressed in a NEPA analysis are "not within EPA's UIC permitting authorities." *Id*.

EPA added the "cumulative effect" requirement to the UIC regulations in 1980 in response to public comments objecting "to the authorization of new wells within an area covered by an area permit where the Director has not considered the cumulative impact of the new wells." 45 Fed. Reg. 33290, 33333 (May 19, 1980). The added language requires "that the Director consider these cumulative impacts before issuing an area permit which authorizes new wells to be drilled without specific approval." *Id*. Significantly, "[t]he final rules do not require that the location of every well that might be drilled under an area permit be identified in advance of permit issuance. However, there must be sufficient information on potential new wells in order for the Director to consider cumulative impact." *Id*. at 33334.

The cumulative effects to be considered are specifically "effects of drilling and operation of additional injection wells" with respect to potential endangerment of underground sources of drinking water (USDWs). On August 27, 1981, EPA published "technical amendments as part of

[2] Although the Region has no requirement to complete a NEPA review for the Permits, Powertech notes that at the time EPA made the Permit decisions at issue in this litigation, CEQ had amended its NEPA regulations in July 2020, removing the definition for cumulative effects. 85 Fed. Reg. 43304, 43343-44 (July 16, 2020). Subsequent to the Permits' issuance, CEQ again amended its NEPA regulations to again include a definition of cumulative effects in April 2022. 87 Fed. Reg. 43304, 43343-44 (April 20, 2022) ("Cumulative effects, which are effects on the environment that result from the incremental effects of the action when added to the effects of other past, present, and reasonably foreseeable actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative effects can result from individually minor but collectively significant actions taking place over a period of time."). Notably, Congress amended NEPA in 2023 to limit the scope of review to "reasonably foreseeable environmental effects of the proposed agency action." 43 U.S.C. §4332(2)(C)(i) (additions underlined).

a settlement agreement reached with petitioners who [had] challenged the regulations in court." 46 Fed. Reg. 43156 (August 27, 1981). The amendments included changes to the area permit provisions. EPA explained "[b]oth the proposed and final UIC regulations included the concept of an area permit to allow an owner or operator of wells with a similar purpose and construction to be authorized by a single permit. The Agency did not intend that injection wells authorized under area permits be required to satisfy most requirements on a single well basis." EPA clarified: "The applicant has the choice of applying for a single well or an area permit provided that he qualifies under § 122.39." *Id*. at 43157.

With respect to the required "cumulative effects" analysis, EPA added the term "project" to its definition of area of review "to clarify requirements for area permit applicants and holders" and noted:

> The definition of area of review in § 146.03 and § 122.3 is amended to clarify the use of the concept in the case of facilities applying for area permits. The new wording emphasizes that in such cases, the area of review includes both the project area and the surrounding area as established according to § 146.06. In addition, the language in § 146.03, which defines area of review is incorporated into §§ 146.06(a)(2), 146.06(b)(1) and 146.06(b)(2) to state Agency intent more clearly.

Id. Accordingly, the UIC requirement to review cumulative effects for area permits is specifically directed at examining within the AoR for potential endangerment of USDWs and does not trigger a NEPA review which would be contrary to the regulatory exemption of UIC permitting from NEPA.

The Region's thorough review of cumulative effects satisfied its obligations under the SDWA regulations. As EPA explained in the Cumulative Effects Analysis ("CEA"), "The Dewey-Burdock Project Area of Review proposed in Powertech's Class III Application is the area for which EPA analyzed the cumulative effects from the drilling and operation of injection wells. The Area of Review includes the Dewey-Burdock Project Area and a buffer zone of 1.2

miles outside the Project Area boundary." EPA, CEA at 1 (Attachment E to EPA's Response to Petition). EPA then clarified that "the CEA's considerations are limited to those environmental effects at or near the project site that occur close in time with the drilling and operation of the injection wells." *Id*. Furthermore, although acknowledging that the CEA itself discusses many other potential environmental effects, including many addressed by NRC in its NEPA analyses, "EPA clarifie[d] that these summaries were provided for informational purposes only and that additional analysis on these topics are not required under 40 C.F.R. [§] 144.33(c)(3)." *Id*. In responding to comments on potential environmental concerns unrelated to the injection wells, EPA repeatedly noted that "these activities are outside the scope of the analysis required in 40 C.F.R. § 144.33" and reiterated that "EPA's discussion of cumulative effects of radioactive waste is limited to those environmental effects at or near the project site that occur close in time with the drilling and operation of the injection wells. It does not include activities further in time or too far away from the project site." RTC #267, at 317. *See also* RTC #338, at 370-371. Petitioner fails to grasp the Region's response and provides no support for its assertion that the Region should have evaluated environmental impacts outside of the scope identified in the CEA.

For these reasons, the Board should deny review of the NEPA-related claims.

II. EPA's Permitting Actions Satisfy SDWA Requirements.

The Petition asserts two SDWA challenges and notes that these were raised in its comments, Petition at 35, but the Petition fails to acknowledge that EPA responded, succinctly and pointedly refuting each challenge. Nor does the Petition "explain why the Regional Administrator's response to the comment was clearly erroneous or otherwise warrants review," as required by 40 C.F.R. § 124.19(a)(4)(ii). For this reason alone, each of the SDWA challenges should be dismissed. *In re Teck Cominco Alaska, Inc*., 11 E.A.D. 457, 494-95 (EAB 2004); *In re Westborough*, 10 E.A.D. 297, 305, 311-12 (EAB 2002); *In re City of Irving*, 10 E.A.D. 111, 129-

30 (EAB 2001), review denied sub nom. *City of Abilene v. EPA*, 325 F.3d 657 (5th Cir. 2003). Instead of addressing EPA's responses directly, the Petition quotes selectively from the RTC, taking statements out of context to support the repeated assertions regarding EPA's failures to meet SDWA and UIC regulatory requirements in accordance with Petitioner's flawed interpretations. To be sure, the Petition refers to EPA's RTC but selectively quotes EPA statements out of context to support the points made in Petitioner's 2017 comments rather than acknowledging the actual response and explaining why it is clearly erroneous.3 On SDWA issues in particular, the Petition largely repeats the comments submitted on the draft permits. "[T]he Board has consistently denied review of petitions which merely cite, attach, incorporate, or reiterate comments previously submitted on the draft permit. E.g., In re City of Pittsfield, NPDES Appeal No. 08-19 (EAB Mar. 4, 2009) (Order Denying Review), aff'd, 614 F.3d 7 (1st Cir. 2010); City of Irving, 10 E.A.D. at 129-30; In re Hadson Power 14, 4 E.A.D. 258, 294-95 (EAB 1992) (denying review where petitioners merely reiterated comments on draft permit and attached a copy of their comments without addressing permit issuer's responses to comments); see also *In re Peabody W. Coal Co*., 12 E.A.D. 22, 33 [634] (EAB 2005) ('[P]etitioner may not

[3] *See, e.g*., Petition at 36, quoting from EPA RTC #63 to support the statement that "information has not been collected to establish meaningful background conditions" without acknowledging or showing to be erroneous EPA's response that, although "UIC regulations require that EPA consider information in 40 C.F.R. § 146.34(a) prior to issuance of a permit," this does not require "a full characterization of the geology and groundwater prior to issuance of a permit." RTC #4, at 103. EPA goes on to state: "The Class III Area Permit requires a full geologic and hydrologic characterization of each wellfield before EPA will approve injection for [ISR operations in a wellfield. This process is consistent with the UIC regulations." *Id*. *See also,* RTC #21, at 123-24: "Part II, Section E.2.b.v requires the Permittee to develop a brief report that includes the analytical results and a description of statistical methods used for computing the background concentration for each constituent for which a background concentration is required and include the report in the Injection Authorization Data Package Reports per Part II, Section H.3.x for review and approval." Similarly selective quotations from the EPA RTC to support Petitioner's 2017 Comments appear at Petition 37, 38, and 41.

simply reiterate comments made during the public comment period, but must substantively confront the permit issuer's subsequent explanations."). In re Bear Lake Properties, LLC, 15 E.A.D. 630, 633 (EAB 2012).

A. EPA's Permit Decisions Did Not Require Additional Baseline Groundwater Information.

The Petition asserts that Powertech failed to provide baseline groundwater information adequate for EPA to grant a permit. The only regulatory provisions cited in support point to the requirements that a permit include an adequate AoR (40 C.F.R. § 146.6(a)(ii)) and that an operator must not "'operate, maintain, convert, plug, abandon, or conduct any other injection activity in a manner that allows the movement of fluid containing any contaminant into underground sources of drinking water…. The applicant for a permit shall have the burden of showing that the requirements of this paragraph are met.' 40 C.F.R. § 144.12." Petition at 35.

In response to Petitioner's comments raising this argument, EPA stated: "the UIC regulations do not require the permit application to define pre-operational baseline water quality." RTC #25, at 126. The EPA RTC went on to explain "EPA determined that the water quality information contained in Appendices N and O of the Class III Permit Application was adequate for developing permit requirements protective of USDWs." *Id*. The Petition does not refute EPA's explanation of the regulatory requirement. Instead, it complains that, "while the existing administrative record contains data from 2007-2009, the background water quality for use in the actual regulatory process for the facility will be established at a future date, outside of any public process, and without the benefit of the public's review and comment." Petition at 36.

The Petition then asserts: "This approach undermines the UIC permitting process, prevents EPA from accurately assessing the potential impacts from the project, and prevents the

public from being able to effectively review and comment on the project. *See* 40 C.F.R. § 124.11." Petition at 36. Yet EPA had already addressed these issues as well in its RTC #36:

> As described above in Response #35, detailed wellfield testing and sampling should be performed under standards set in the Permit, following permit issuance. The Permittee will not be allowed to inject into the wells until after submittal of the injection authorization data package report and EPA reviews and can confirm that the Permittee has met all the requirements under Part II, Section I. The detailed requirements set out in this section include among other things: a map and cross sections of ore deposits; a map of injection, production and monitoring wells; logging and testing results for all wells; demonstration of overlying and underlying confining zones; performance of corrective action, mechanical integrity of the wells; groundwater water quality testing results; wellfield pump test data; and characterization of faults, fractures, and lithologic variability that might provide preferential flow paths or otherwise affect groundwater flow. Part II, Section H includes the complete description of requirements for the Injection Authorization Data Package Reports.
>
> The draft permit that was available for public comment detailed the extensive data and testing requirements. The public also had the opportunity to review what the Permit requires the Permittee to demonstrate to EPA with this data and testing in order to be issued an authorization to inject and begin operations. This process is in accordance with the regulations at 40 C.F.R. § 146.34.
>
> If the information acquired during wellfield testing leads to a major modification of the permit under 40 C.F.R. § 144.39, the public will have the opportunity for notice and comment on those proposed modifications.

RTC #36, at 132. However, even while acknowledging that "the background water quality for use in the actual regulatory process for the facility will be established at a future date," Petition at 35, the Petition fails to explain why these EPA responses were clearly erroneous.

With respect to adequately delineating the AoR, EPA pointed to the zone of endangering influence provision for area permits: "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). RTC #184, at 232. EPA then explained how public input was accommodated:

> While the commenters express concern about the lack of opportunity for public comment, the public was given an opportunity to provide comments on the chosen AOR in the project, both in the original permit proposal in 2017 and in the subsequent permit re-proposal in 2019. However, commenters did not provide any specific comments on this issue in the Class III context.
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> 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. § 146.4 and on site-specific factors related to those criteria. 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. Following review of the necessary information, EPA proposed the AE with a description of the boundary that the public had opportunity to comment on."

Id. at 232-33.

The Petition asserts "there is no legal, technical, or practical basis to forgo gathering this needed data as part of the UIC application process." Petition at 37. What the Petition fails to recognize, however, is that there is also no requirement for the applicant to submit this information to obtain a permit or for EPA to submit that information to public comment.

In sum, the Petitioner has failed to explain how the data presented in the application is not sufficient for the permitting analysis conducted by EPA. Moreover, "[o]n matters that are fundamentally technical or scientific in nature, the Board typically defers to a permit issuer's technical expertise and experience, as long as the permit issuer has adequately explained its rationale and supported its reasoning in the administrative record." *Ariz. Pub. Serv.*, 18 E.A.D. at 251; *Gen. Elec.*, 17 E.A.D. at 514-15. Although an extensive amount of data is to be collected and submitted to EPA (and NRC) for review prior to the authorization of injection for each wellfield area, that standard process has been conducted for decades by licensed uranium ISR

operations.[4] Furthermore, the purpose of the data submitted with the application is for the general characterization of the project AoR sufficient for permitting the project. Because of the hundreds of closely spaced monitor wells required for a project of this type, it is impractical and unnecessary to gather all this data in advance of permitting. Moreover, the ring of monitoring wells required around the perimeter of the project will operate to detect and prevent migration of contaminants from the project into any USDW. That is why EPA said in its RTC #63 that it "agrees that the results of monitoring will support an understanding of the fate and transport of contaminants. Part IV of the Class III Area Permit requires the Permittee to develop a conceptual site model (CSM) based on site-specific data that represents the geology, hydrologic properties, and geochemical characteristics and processes at the Dewey-Burdock Project to minimize uncertainty of model predictions concerning the potential for ISR contaminants to cross the aquifer exemption boundary." RTC #63, at 148. Petitioner fails to demonstrate clear error in the Region's determination, based on its technical expertise, that the data it reviewed adequately allowed for characterization of the project AoR.

B. EPA's Permit Decisions Did Not Require Additional Hydrogeological Analysis.

The Petition asserts "EPA's analysis fails to provide sufficient information regarding the hydrologic and geological setting of the area." Petition at 38. Essentially, the Petition asserts that the hydrologic and geological data are inadequate, Petition at 38-39, that EPA's analysis of the data was inadequate, Petition at 43, that the available data fail to demonstrate fluid containment and protection of USDWs, Petition at 41-42, that both data collection and EPA's analysis must be completed before a permit is issued, and that the public must be given an opportunity to

[4] *See*, https://www.nrc.gov/materials/uranium-recovery/license-apps.html (Accessed on December 22, 2023) (citing facilities permitted in 2007, 2010, and 2013).

comment on all of the data and EPA's analysis. Petition at 41. Petitioner is wrong. The Petition fails to demonstrate clear error in the Region's analysis of technical information or address the Region's thorough responses to Petitioner's arguments.

1. Hydrogeologic Data and EPA Analysis Are Adequate

The Petition indicates that this hydrologic and geological issue was raised in its comments. Petition at 35. But the Petition does not acknowledge EPA's response that the UIC regulations do not require "a full characterization of the geology and groundwater prior to issuance of a permit." RTC #4, at 103. EPA's response continued:

> EPA disagrees that adequate preliminary baseline geologic and hydrogeologic analysis has not been conducted at the Dewey-Burdock project site. EPA summarized its evaluation of the geological and hydrological analysis provided in the Class III Permit Application, including the adequacy of confining zones, in Sections 3.0 and 4.0 of the Fact Sheet for the draft Class III Area Permit. Information reviewed included drillhole logs, cross sections, and pump test data in order to evaluate the confining zones for the proposed injection intervals.

Id. EPA went on to explain that "[t]he Class III Area Permit requires a full geologic and hydrologic characterization of each wellfield before EPA will approve injection for [ISR] operations in a wellfield. This process is consistent with the UIC regulations." *Id*. Petitioner fails to demonstrate "why the Region's response to comments on the issue raised is clearly erroneous or otherwise warrants review." *Ariz. Pub. Serv.*, 18 E.A.D. at 251.

2. Containment and Protection of USDWs Are Assured.

Regarding the need for containment assurance, EPA acknowledged "the potential for communication between aquifers in this area" and emphasized that "the Class III area permit addresses this potential concern through a number of permit requirements." RTC #2, at 101. The Permit requires:

- Plugging any private wells that would provide a conduit through confining zones in the wellfield;

- Wellfield pump tests to identify areas where the confining zones are compromised by improperly plugged exploration boreholes and wells that may provide pathways through confining zones; and
- Identifying any naturally occurring conduits, such as fractures or faults, that compromise the integrity of confining zones.

RTC #2. at 101. Furthermore, "The Class III Area Permit requires a full geologic and hydrologic characterization of each wellfield before EPA will approve injection for [ISR] operations in a wellfield." EPA RTC #4 at 103. Petitioner fails to demonstrate any clear error in the Region's reasonable determination that, based on Permit requirements, containment and protection of USDWs are assured.

3. Opportunity for Public Review and Comment Was Sufficient.

In responding to public comments, EPA acknowledged commenters concerns "that wellfield testing and sampling will be performed after permit issuance . . . [and] not be subject to public review or comment." RTC #36, at 131-32. EPA responded by explaining that "detailed wellfield testing and sampling should be performed under standards set in the Permit," and reiterated the details of the testing and sampling requirements prescribed in the permit. Id. at 132. EPA also emphasized that "[t]he Permittee will not be allowed to inject into the wells until after submittal of the injection authorization data package report and EPA reviews and can confirm that the Permittee has met all the requirements." *Id*. With respect to public review and comment, EPA stated:

> The draft permit that was available for public comment detailed the extensive data and testing requirements. The public also had the opportunity to review what the Permit requires the Permittee to demonstrate to EPA with this data and testing in order to be issued an authorization to inject and begin operations. This process is in accordance with the regulations at 40 C.F.R. § 146.34.
>
> If the information acquired during wellfield testing leads to a major modification of the permit under 40 C.F.R. § 144.39, the public will have the opportunity for notice and comment on those proposed modifications.

Id. The Petition does not even acknowledge EPA's RTC on denial of public review on these issues, let alone try to show the inadequacy of that response as required. *See Ariz. Pub. Serv.*, 18 E.A.D. at 251.

C. Non-Endangerment Assurance Is Not Restricted to the Permit Application.

The Petition states "SDWA regulations require that no operator may 'operate, maintain, convert, plug, abandon, or conduct any other injection activity in a manner that allows the movement of fluid containing any contaminant into underground sources of drinking water…. The applicant for a permit shall have the burden of showing that the requirements of this paragraph are met.' 40 C.F.R. § 144.12." Petition at 35. The Petition goes on to assert that "the applicant has not met its burden under 40 C.F.R. § 144.12(a) with respect to the Class V well application." *Id*. at 38. Later it states: "Importantly, this provision specifically refers to the burden on the 'applicant' signifying that the requisite demonstration must be made before the permit is issued." *Id*. at 41.

The Petition misconstrues the role of § 144.12(a) in the UIC program. Section 144.12(a) codifies the non-endangerment standard that is the core of the SDWA UIC provisions that are directed at protecting USDWs by preventing contamination by underground injection activities that may "adversely affect the health of persons." 42 U.S.C. § 300h(d)(2). That requirement for non-endangerment assurance is not restricted to the permit application stage, as evidenced by the inclusion of the words "operate, maintain, convert, plug, abandon, or conduct . . . injection activity," none of which can occur until after a permit is issued and a wellfield is constructed. Accordingly, there is an ongoing obligation of injection well owners and operators to provide that assurance of non-endangerment. That is why the opening words of § 144.12 are: "No owner or operator shall."

Use of the word "applicant" in the last sentence of § 144.12(a) suggests more of a focus on the application process than is warranted. It reflects the regulatory history of the provision rather than an intended restriction. The original version of this provision was promulgated as 40 C.F.R. § 122.34(a)[5] and was solely a prohibition on authorizing injection that would result in any fluid movement into USDWs for Class I, II, or III wells. EPA revised that language in 1982 to state that "[n]o authorization by permit or rule shall allow the movement of fluid containing any contaminant into underground sources of drinking water, if the presence of that contaminant may cause a violation of any primary drinking water regulation under 40 C.F.R. Part 142 or may otherwise adversely affect the health of persons." 47 Fed. Reg. 4992, 4997 (Feb. 3, 1982). That same revision added the sentence stating: "The applicant for a permit shall have the burden of showing that the requirements of this paragraph are met." *Id.* Therefore, the focus is on what the permit "allows" during operations rather than on what the applicant must demonstrate solely within the application itself.

The 1983 addition to § 144.12(a) of the opening language "No owner or operator shall construct, operate, maintain, convert, plug, abandon, or conduct any other injection activity" clarified that this provision is not limited to the application stage. 48 Fed. Reg 14146, 14194 (Apr. 1, 1983). The preamble to the 1983 final rules explained that such wording changes were

[5] § 122.34 Prohibition of movement of fluid into underground sources of drinking water. (Applicable to State UIC programs, see § 123.7.)

> (a) No UIC authorization by permit or rule shall be allowed in the following circumstances:
> (1)Where a Class I, II, or III well causes or allows movement of fluid into underground sources of drinking water.
> (2) Where a Class IV or V well causes or allows movement of fluid containing any contaminant into underground sources of drinking water, and the presence of that contaminant may cause a violation of any primary drinking water regulation under 40 C.F.R. Part 142 or which may adversely affect the health of persons.

45 Fed. Reg. 33290, 33437 (May 19, 1980).

made to move from an "indirect description of what standard a [UIC] program must require an owner/operator meet, to language that simply states that an owner/operator 'is required' to meet the standard." *Id*. at 14148. Section 144.1(g), though worded indirectly, is instructive in emphasizing that "no injection shall be authorized by permit or rule if it results in" endangerment of an USDW as defined in § 144.12. 40 C.F.R. § 144.1(g). Again, the focus is on what will "result" during the operating phase of a project. Thus, non-endangerment is not something that must be demonstrated solely and completely in the application phase.

D. UIC Class III Regulations Not Only Allow But Require Post-Permit Data Collection and Corrective Action.

UIC permitting is a multi-step process that begins with an application, proceeds to a completeness determination, 40 C.F.R. § 144.31(d), followed by a technical review, issuance of a draft permit for public review, issuance of a final permit allowing the operator to construct wells and collect data, and only then an authorization to inject that follows complete review of the data collected and confirmation that corrective actions are completed to assure containment. The permit application requirements in 40 C.F.R. §§ 144.31 and 146.34 call for sufficient information to allow EPA to "exercise . . . 'considered judgment' in making a site-specific determination that the proposed underground injection well will not endanger underground drinking water supplies." *In re West Bay Exploration Co.*, 17 E.A.D. 204, 220 (EAB 2016).

In this case, EPA obtained all the necessary information and exercised its considered judgment to make site-specific determinations about the conditions to include in the Permits. As noted before, EPA explained the breadth of its analysis in RTC #4, including evaluation of (i) the geological and hydrological analysis provided in the Class III Permit Application, drillhole logs, cross sections, and pump test data; (ii) the Tennessee Valley Authority (TVA) pump test reports and Draft Environmental Statement; (iii) geologic maps of the project area and surrounding

areas, and (iv) USGS reports describing geologic and hydrologic conditions in the vicinity of the Dewey-Burdock project site. RTC #4, at 103. Furthermore, EPA "work[ed] cooperatively with the USGS and the EPA [Office of Research and Development] to conduct independent analyses of groundwater and develop a reactive transport model in the Burdock Area to provide information about the fate and transport of ISR contaminants at the site." *Id*.

Specifically for the Class III permit, the conditions included a number of provisions requiring collection of additional data as contemplated by the UIC Class III regulations. 40 C.F.R. § 146.32(b) requires as part of the well construction process that:

> Appropriate logs and other tests shall be conducted during the drilling and construction of new Class III wells. A descriptive report interpreting the results of such logs and tests shall be prepared by a knowledgeable log analyst and submitted to the Director. The logs and tests appropriate to each type of Class III well shall be determined based on the intended function, depth, construction and other characteristics of the well, availability of similar data in the area of the drilling site and the need for additional information that may arise from time to time as the construction of the well progresses.

In addition, during the operational phase after injection has commenced, 40 C.F.R. § 146.32(e) requires monitoring wells "completed into the injection zone and into any underground sources of drinking water above the injection zone which could be affected by the mining operation . . . to detect any excursion of injection fluids, process by-products, or formation fluids outside the mining area or zone."

Although 40 C.F.R. § 146.34(a)(3) requires "tabulation of data reasonably available from public records or otherwise known to the applicant on wells within the area of review . . . which penetrate the proposed injection zone," including plugging information, the same section expressly allows EPA to rely on "data on a representative number of wells" where "the information would be repetitive and the wells are of similar age, type, and construction." In the case of the leaky historic drillholes that EPA recognized as a potential source of communication,

it was sufficient to rely on representative data and require that all such wells be identified and addressed through corrective action. Using this approach, "EPA has determined that Powertech documented an adequate investigation to identify improperly plugged historic exploration boreholes in the Class III Permit Application, which is in accordance with the UIC regulations." RTC #13, at 118. The Petition does not explain why this response is clearly erroneous.

In addition, 40 C.F.R. § 144.55 requires for "wells which are improperly sealed, completed, or abandoned" within the AoR that "the applicant shall also submit a plan consisting of such steps or modifications as are necessary to prevent movement of fluid into underground sources of drinking water ('corrective action')" or that EPA "prescribe a plan for corrective action as a condition of the permit." 40 C.F.R. § 144.55(a). That section further dictates that "No owner or operator of a new injection well may begin injection until all required corrective action has been taken." 40 C.F.R. § 144.55(b)(2). The specific corrective action requirements here were summarized by EPA in RTC #247:

> As discussed in Section 4.2.3 of the 2019 Fact Sheet for the draft Class III Area Permit, Part II of the Class III Area Permit requires the Permittee to take steps to identify leaky historic drillholes near the wellfield areas during the design and implementation of the wellfield pump tests (Section C), during the design of the wellfield monitoring system (Section D), during the implementation of formation testing (Section E), and during the implementation of the corrective action requirements in Part III. The Permittee must complete these actions prior to receiving authorization to inject, to prevent these drillholes, or any other type of confining zone breach, from acting as pathways for contamination of USDWs. As discussed in Section 4.6 the 2019 Fact Sheet for the draft Class III Area Permit, the Permittee will not be able to begin injection activity until any breaches in injection interval confining zones are resolved. Corrective action allowed under the Class III Area Permit includes locating and plugging of improperly plugged historic exploration boreholes when they are able to be located. If there is a confining zone breach that cannot be located or physically corrected, UIC regulations and Class III Area Permit requirements also allow the Permittee to implement operational controls such as balancing flow and pressure in well patterns around a breach. If operational controls are used as the corrective action method, the Permittee must design and implement monitoring plan capable of

> demonstrating control of lixiviant in the areas where any breaches in the confining zone have been identified.

RTC #247, at 291-92.

EPA's RTC expressly notes "EPA is aware of the hydrology at this site and the potential for communication between aquifers in this area." RTC # 2, at 101. To be sure, "the Class III area permit addresses this potential concern through a number of permit requirements." *Id*.

As noted in the Petition at 40, "[t]hese issues of fluid containment were also explored during the NRC hearing" and were raised in Petitioner's challenge to the NRC license along with the objection to postponing the collection of additional data on hydrogeology. Although not controlling, it is instructive to see how the D.C. Circuit decision addressed this challenge. There, the court noted (i) that "the Tribe argues that the agency impermissibly delayed analyzing water quality baseline data because it allowed Powertech to gather data after the license was issued," and (ii) that "[t]he Tribe also argues the Commission failed to analyze the impacts of preexisting boreholes in the Dewey-Burdock area and left these issues for after the license was granted." *Oglala Sioux Tribe v. U.S. Nuclear Regulatory Comm'n*, 45 F.4th 291, 302 (D.C. Cir. 2022). The court rejected both challenges, holding that (i) "it was not unreasonable for the agency to augment pre-licensing data with further testing after Powertech installed its well field but before it began operations," *id*., and (ii) "It was also entirely reasonable for the Commission to require that Powertech fix improperly plugged historic boreholes after receiving a license." *Id*. at 303. With respect to the potential "impacts of the preexisting boreholes in the Dewey-Burdock area," the court found that "the Commission gave these impacts a hard look." *Id*. at 302. Here, as with the NRC licensing, such an approach is consistent with the UIC regulations.

The Petition states: "EPA provides no lawful reason to delay critical data gathering through physical surveys until after the permits are issued." Yet EPA explains in its RTC # 35:

> EPA is requiring formation testing prior to granting authorization to inject and operation of the wells. However, EPA must issue the Permit in order to establish the appropriate standards for construction and testing and to ensure that the standards are enforceable. This is consistent with the UIC regulations for Class III wells.

Id. at 131. As explained above, the UIC regulations not only anticipate, but also require, post-permit monitoring and data collection. The lawful reason for delaying formation testing, data collection, and required corrective action is to make those requirements enforceable and subject to the bar on injection until completed. The Petition neither acknowledges this response nor explains why it is clearly erroneous.

III. The Region's Issuance of the UIC Permits Complied with the Administrative Procedure Act.

A. Petitioner Fails to Demonstrate the Region's Administrative Record is Clearly Erroneous or Otherwise Warrants Review.

The Administrative Record (AR) includes all required communications. The Tribe incorrectly asserts that communications between EPA and Powertech that occurred as Powertech developed its UIC permit applications should have been included in the AR. Petition at 45-46. Petitioner does not specifically list the communications it wishes to have included in the AR, nor does it identify what key information in those communications it believes constitutes "an important aspect of the problems at hand" that EPA failed to consider. *Id*. at 46. Nonetheless, EPA appropriately explained in its RTC that the AR includes all documents required by 40 C.F.R. § 124.9(b) (draft permits) and § 124.18 (final permits) and that the documents referenced by the Petitioner "were communications between EPA and Powertech for the purpose of providing technical assistance to Powertech to develop complete UIC permit applications, not to acquire information from them to inform permitting or aquifer exemption decisions." RTC #185, at 233-34. EPA reasonably concluded that the communications referenced by the Petitioner are not appropriately part of this AR. *Id*.

Petitioner fails to meaningfully confront the Region's RTC on this issue and falls short of meeting its burden to "demonstrate, with factual and legal support, why the Region's RTCs on the issue raised is clearly erroneous or otherwise warrants review." *Ariz. Pub. Serv.*, 18 E.A.D. at 251 (citing 40 C.F.R. § 124.19(a)(4)(i)); *In re Seneca Res. Corp*., 16 E.A.D. 411, 416 (EAB 2014)). Petitioner suggests, without legal support, that communications that occurred prior to the submission of final draft applications in 2013 should be included in the AR because previous versions of the draft applications were deemed administratively complete in 2008 and 2010, respectively. Petition at 46. Neither the regulations nor case law require the Region to include communications between EPA and the applicant prior to submission of the relevant permit applications in the AR. Because the Region did not rely on these communications in making its decision, *see* RTC #185, at 233-34, they are not required to be included in the AR. *See In re Dominion Energy Brayton Point, LLC* Permit No. MA 0003654, 13 E.A.D. 407 (EAB 2007); *In re BP Cherry Point*, 12 E.A.D. 209 (EAB 2005).

B. The 2007-2009 Documents Identified by Petitioner Do Not Amount to a De Facto Rule That Required Notice-and-Comment Rulemaking Under the APA.

The UIC permits at issue are complex and raise a number of technical issues specific to ISR uranium recovery. It took years for Powertech to develop the relevant permit applications. As part of the permit process, "consistent with the ordinary process for working with permit applicants," EPA had regular communications with Powertech and its consultants that informed Powertech's development of its applications. RTC #183, at 231. Petitioner erroneously claims that documents and communications exchanged between the Region and Powertech to inform development of the permit applications constitute a binding regulatory approach that should have been subject to APA notice-and-comment requirements. Petition at 47-51. Specifically, Petitioner raises concerns with: a 2008 document entitled, "In-Situ Uranium Leaching-Related

Activities by OPRA's Underground Injection Control Program" (Petition Attachment 29); a 2008 draft document entitled "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" (hereinafter, "Class III Discussion Document") (Petition Attachment 30); and a number of communications between EPA and Powertech and its consultants that occurred in 2007-2009 during development of the initial permit applications (Petition Attachments 32-34).

As a threshold matter, this argument is not properly before the Board. Petitioner's generalized complaints regarding technical communications between EPA and the permit applicant do not amount to a "challenge to the permit decision . . . based on . . . a finding of fact or conclusion that is clearly erroneous" or "an exercise of discretion or important policy consideration the [Board] should, in its discretion, review." 40 C.F.R. § 124.19(a)(4)(ii). The Petition does not identify any specific aspects of the UIC permits that are erroneous because they relied on information developed by the Region in coordination with Powertech. Indeed, the Region has explained that these communications were to inform development of the permit applications, not the Region's decision to issue the permit. RTC §185at 233-34. But even if Petitioner could identify a *de facto* rulemaking that the Region used in its permitting decision, the Board does not review challenges to substantive standards or regulations that inform a permitting decision. *See, e.g., FutureGen Indus. All.*, 16 E.A.D. 717, 724 (EAB 2015) ("Under Part 124, the Board is charged with reviewing permitting decisions and determining whether the permitting authority has acted in accordance with Agency regulations; the Board is not charged with reviewing the underlying Agency regulations.").[6]

[6] *See also In re: City of Keene*, 18 E.A.D. 729, 744 (EAB 2022) (The Board "has consistently denied review of challenges to water quality standards or other predicate decisions raised in permit appeals."); *Ariz. Pub. Serv., Co.*, 18 E.A.D. at 300 ("we generally do not consider 'the

Even if Petitioner's collateral attack on the 2007-2009 documents and communications between EPA and Powertech were properly before the Board, these documents do not amount to a *de facto* rule or regulatory scheme that required notice and comment under the APA. In evaluating whether an agency guidance or policy document is a *de facto* rulemaking, courts generally consider whether the agency has "(1) impose[d] any rights and obligations, or (2) genuinely [left] the agency and its decisionmakers free to exercise discretion." *CropLife Am. v. EPA*, 329 F.3d 876, 883 (D.C. Cir. 2003) (citation and internal quotation marks omitted). "[T]he ultimate focus of the inquiry is whether the agency action partakes of the fundamental characteristic of a regulation, i.e., that it has the force of law." *Gen. Elec. Co. v. EPA*, 290 F. 3d 377, 382 (D.C. Cir. 2002) (quoting *Molycorp, Inc. v. EPA*, 197 F. 3d 543, 545 (D.C. Cir. 1999)).

As the Region explained in its RTC, the Region's issuance of the UIC permits was based on and consistent with the UIC regulations, which provide explicit authority for issuance of UIC permits for ISR uranium recovery and criteria for issuance of Class III and V permits. RTC #182, at 231 (citing 40 C.F.R. Parts 144 to 146). The Region did not base the permit issuance on the 2007-2009 documents, which are—at most—"nothing more than general policy statements with no legal force." *Ctr. for Auto Safety v. NHTSA*, 452 F. 3d 798, 807-08 (D.C. Cir. 2006). The Class III Discussion Document was intended to inform EPA's site-specific permit determinations, which must identify the zone of influence, AoR, and aquifer exemption boundary based on site-specific factors. RTC #184 at 232. The document provides additional details as to factors EPA may consider in making these site-specific determinations; it does not set binding precedent for future permits. *Id*. Likewise, the other communications referenced by

validity of prior, predicate regulatory decisions that are reviewable in other fora,' including but not limited to the development of TMDLs or the development of impaired water lists.").

Petitioner "do not determine any rights or obligations, nor do [they] have any legal consequences" and therefore cannot be taken as a "final agency action," or otherwise be seen as constituting a "binding legal norm." *Ctr. for Auto Safety*, 452 F.3d at 809. Indeed, many of these communications explicitly reference the preliminary nature of the technical discussions.[7] These communications were "for the purpose of providing technical assistance to Powertech to develop complete UIC permit applications, not to acquire information from them to inform permitting or aquifer exemption decisions." RTC #at 234. Petitioner fails to identify any binding obligations for Powertech or later permittees that were imposed in these communications.

For these reasons, the Board should deny review of Petitioner's claims that the UIC permits were issued in violation of the APA.

IV. The Board Should Deny Review of the Petition's NHPA Section 110 Claim.

As the Board notes in its November 16, 2023, Order Denying Motion to Amend Petition, the Petition "contains a passing reference to NHPA [§] 110." Order Denying Motion to Amend at 29. The Order appropriately recognizes that "[i]t is not clear on the face of the petition whether the Tribe is asserting that the Region violated Section 110, or how, in fact, it violated that section." *Id*. The Board should deny this argument because the Petition fails to "identify the contested permit condition or other specific challenge to the permit decision and clearly set forth,

[7] *See, e.g.,* Petition Attachment 33 bates 0240 ("Please do not be dismayed if the permit application you have prepared does not look exactly like the descriptions for attachments and checklists for figures. I consider review of your permit application to be a test for these **draft documents** to see how they hold up in reference to reality.") (emphasis added); Petition Attachment 33 bates 0157 (The permit checklist "**is still in DRAFT form**, so please let me know if it coincides with what you were thinking or if there is a way to **make it more helpful for permit applicants**.") (emphasis added); Petition Attachment 32 bates 0043 ("I have been working on creating permit application guidelines for Class III ISL wells over the last few months. The guideline [sic] have been taking shape as I talk with you about all about different things . . . I am just concerned that the **guidelines-in-the-making** were not as clear as they really needed to be for the first permit application.") (emphasis added).

with legal and factual support, petitioner's contentions for why the permit decision should be reviewed." 40 C.F.R. § 124.19(a)(4). Indeed, the Petition does not allege any specific violation of Section 110. Petition at 22. The Board has repeatedly held that "mere allegations of error" are insufficient to support review and that it will not entertain vague and unsubstantiated arguments. *See In re City of Moscow*, 10 E.A.D. at 172 (EAB 2001); *In re New England Plating Co*., 9 E.A.D. 726, 730 (EAB 2001).

Nor could Petitioner demonstrate a violation of Section 110 because "Section 110 does not affirmatively mandate the preservation of historic buildings or other resources . . . and only requires an agency to comply to the fullest extent possible with, and in the spirit of, the Section 106 consultation process . . . ." *Nat'l Parks Conservation Ass'n v. Semonite*, 311 F. Supp. 3d 350, 380 (D.D.C. 2018) (quoting *Oglala Sioux Tribe v. U.S. Army Corps of Eng'rs*, 537 F. Supp.2d 161, 173 (D.D.C. 2008)). And, as the Board's Order points out, any Section 106 claims are no longer at issue. Order Denying Motion to Amend at 29. Furthermore, even if section 110 might require any identification and evaluation of cultural resources, that requirement is satisfied by Part XIV, Section A of the Class III Area Permit which requires Powertech to address cultural resources during the implementation of the project. *Cf. Oglala Sioux Tribe v. NRC*, 45 F.4th 291, 306 (D.C. Cir. 2022) (Commission can employ a phased identification and evaluation of historic properties" where "[t]he agency …recognized that some tribal historic properties could be identified only after Powertech broke ground" and created "a process whereby newly discovered properties could be protected and evaluated"). The D.C. Circuit held that, using this process, "The Commission reasonably satisfied its obligations under the NHPA's regulatory scheme." *Id*.

Furthermore, even if section 110 might require any identification and evaluation of cultural resources, that requirement is satisfied by Part XIV, Section A of the Class III Area

Permit which requires Powertech to address cultural resources during the implementation of the project. Cf. *Oglala Sioux Tribe v. NRC*, 45 F.4th 291, 306 (D.C. Cir. 2022) (Commission can employ a phased identification and evaluation of historic properties" where "[t]he agency …recognized that some tribal historic properties could be identified only after Powertech broke ground" and created "a process whereby newly discovered properties could be protected and evaluated"). There, the Court held that, using this process, "The Commission reasonably satisfied its obligations under the NHPA's regulatory scheme." *Id*.

V. The Board Should Dismiss the Amicus Curiae Brief of the Alliance.

The Board should dismiss the Brief Amicus Curiae of the Great Plains Tribal Water Alliance, Inc. ("Alliance") as an untimely petition for review. Although that document purports to be an amicus brief supporting the Petition, it does not address any of the issues raised in the Petition; instead, it seeks to raise entirely new issues for review. Because Alliance's brief serves exclusively to raise new issues rather than to assist the Board in resolving the issues presented by the Petition, it is – in substance – a late-filed petition for review that should be dismissed as such.

The Board routinely dismisses late-filed petitions for review as untimely. *See e.g., In re Envotech L.P*, 6 E.A.D. 260, 266 (EAB 1996). Similarly, the Board declines to entertain new issues raised in late-filed "supplements" to timely-filed petitions for review. *See In re Knauf Fiber Glass, GmbH*, PSD Appeal Nos. 99-8 through 99-72 at 5 (EAB, January 3, 2000) (Order Dismissing Certain Appeals on Timeliness and Standing). Consistent with this approach, the Board has held that new issues "raised for the first time at the reply stage of the[] proceedings are equivalent to late filed appeals and must be denied on the basis of timeliness." *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 126 n.9 (EAB 1999). The same is true of new issues raised in other briefs filed after the deadline for the filing of petitions for review, including amicus briefs. *See In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 595 & n.168 (EAB 2006) (citing cases

and declining to consider arguments that were raised in an amicus brief "rather than in a timely petition"); *id*. at 626 n. 215; 651 n. 263, and 661-62 n.286 (applying the same principle). Accordingly, the new claims raised by the Alliance's brief are not properly before the Board and should be dismissed as untimely. Because the Alliance's purported amicus brief addresses only these untimely claims, rather than the claims raised in the Petition, the Board should dismiss the entire amicus brief.

A. The Alliance's Brief Raises Distinctly Different Issues than the Petition.

The issues raised by the Petition are whether the Region:

- Failed to demonstrate compliance with the requirements of the National Historic Preservation Act, 16 U.S.C. §§ 470, *et seq*. and implementing regulations;
- Failed to demonstrate compliance with the cumulative effects analysis required by 40 C.F.R. § 144.33(c)(3), the "functional equivalence" doctrine, and NEPA's "systematic, interdisciplinary approach" to federal decisionmaking under 42 U.S.C. § 4332(2)(A);
- Failed to demonstrate compliance with the SDWA and implementing regulations, including 40 C.F.R. § 144.12, 40 C.F.R. § 146.33(a), and 40 C.F.R. § 146.6(a)(ii), regarding containment of mining fluid within the exempted aquifer and protection of underground sources of drinking water; and
- Failed to comply with the procedural rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. §§ 701, *et seq*.

Petition at 8-9. The Alliance's brief does not address any of these issues. Instead, it raises distinctly different issues involving the Region's alleged:

- "Failure to comply with the over-arching government-to-government consultation requirements of E.O. 13175 and the EPA and Region 8 Indian Policies"[8]; and

[8] Amicus Brief at 2. In arguing this challenge, the amicus brief also appears to assert that EPA failed to comply with "consultation rights" under the Fort Laramie Treaty of April 29, 1868," *id*., and with "international law requirements for consultation with the governing bodies of indigenous Tribes, for projects or policies affecting traditional or aboriginal lands" under Article 19 of the United Nations Declaration of the Rights of Indigenous Peoples. *Id*. at 5.

- "Failure to comply with agency policies on tribal consultation" in violation of 5 U.S.C. §706(2)(A).[9]

The entire text of the amicus brief is devoted to asserting and supporting these two specific challenges rather than any of the challenges raised in the Petition.[10]

B. The Issues Raised by the Alliance's Brief Should be Dismissed as Untimely.

The Board has consistently held that new issues cannot be raised for review in filings submitted after the deadline for seeking review has passed. Such issues are "equivalent to late filed appeals and must be denied on the basis of timeliness." *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 126 n.9 (EAB 1999); *see also In re Ariz. Pub. Serv. Co*., 18 E.A.D. 245, 272-73 (EAB 2020); *In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 219 n.62 (EAB 2000); *In re City of Ames, Iowa*, 6 E.A.D. 374, 382 n.22 (1996) ("Because the supplementary brief raises a new issue and was filed after the Appeal period under section 124.91(a) had passed, we are denying the City's motion for leave to file its supplementary brief."). The same principle applies when an amicus brief raises new issues. *See In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. at 595 & n. 168, 626 n. 215, 651 n. 263, and 661-62 n.286; *In re Palmdale Hybrid Power Plant*, PSD Appeal No. 11-07 (EAB Apr. 27, 2012) (Order Denying Motion to Intervene) ("issues [that] should have been timely raised in a petition for review . . . may not be raised belatedly in an intervention motion, motion to participate, intervenor brief, or amicus curiae brief").

As was true in *Dominion Energy*, the arguments the Alliance seeks to raise "could have been reasonably ascertained and raised in a timely permit appeal," but were not. *Dominion*

[9] *Id*. at 8.

[10] The amicus brief fails to mention that the issues it raises were advanced by other parties during the permitting process and specifically addressed by the Region in its RTC. *See* RTC at 248-65. Nor does the amicus brief engage the Region's responses to explain why they were clearly erroneous or would otherwise warrant review. Consequently, the amicus brief does not raise any cognizable issues at all.

Energy, 12 E.A.D. at 595. The Alliance failed to file its own timely petition and cannot belatedly raise its issues in an amicus brief. *Id.*

As was also the case in *Dominion Energy*, the generality of the of the issues raised in the Petition do not "open the door" to the "more tailored" and legally distinct arguments the Alliance seeks to raise. *Id*. ("We are not convinced by . . . arguments that the Petition, because of its great breadth, essentially opened the door to *any* issues pertaining to the Final Permit"). Nor does the fact that the Petition raised some consultation-related arguments open the door to the different and legally distinct consultation arguments the Alliance seeks to raise. *Id*. (the fact that a petition raised issues concerning "variances" did not allow *other issues* concerning "variances" to be raised in an amicus brief); s*ee In re City of Ames*, 6 E.A.D. 374, 388 n.22 (EAB 1996) (denying a petitioner's request to file a supplementary brief where the appeal period under § 124.91(a) had passed and the brief raised a related but "distinct" new issue).

Because it does not address any of the issues raised in a timely petition before the Board, the Alliance's brief is, in substance, a late-filed petition for review that should be dismissed as such. Because the brief is styled as an amicus brief but does not serve the purpose of such, the Board should dismiss the brief in its entirety.

Conclusion

For the foregoing reasons the Board should dismiss the Petition and Amicus Brief.

Respectfully submitted,

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Statement of Compliance with Word Limitation

This response to the petition for review complies with the requirement that petitions for review not exceed 14,000 words. This response to the petition for review, excluding attachments, is approximately 12,296 words in length.

Certificate of Service

I hereby certify that, on December 22, 2023, I served the foregoing document on the following persons by e-mail in accordance with the Environmental Appeals Board's September 21, 2020 Revised Order Authorizing Electronic Service of Documents in Permit and Enforcement Appeals:

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