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

In re: Powertech (USA) Inc. Permit No. SD31231-0000 and SD52173-0000	UIC Appeal No. 25-01

EPA REGION 8'S RESPONSE TO PETITION FOR REVIEW

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INTRODUCTION

The U.S. Environmental Protection Agency ("EPA") Region 8 hereby responds to the Petition for Review ("Petition") submitted by the Oglala Sioux Tribe ("Tribe"), the Clean Water Alliance, and the NDN Collective (collectively, "Petitioners") on April 11, 2025. On March 14, 2025, the Region re-issued Class III Underground Injection Control ("UIC") Area Permit No. SD31231-0000 and Class V UIC Area Permit No. SD52173-0000 to Powertech (USA) Inc. ("Powertech") for an in-situ uranium mining facility. These permits were issued under the UIC Program of the Safe Drinking Water Act ("SDWA"), 42 U.S.C. § 300h, *et seq*. The Region's reissuance of the permits is the culmination of more than a decade of effort, including two rounds of public comment on draft versions of the permits and a previous petition by the Tribe that led to the September 3, 2024 Environmental Appeals Board ("EAB" or "Board") decision on UIC Appeal No. 20-01. *See In re Powertech (USA) Inc*., 19 E.A.D. 23 (EAB 2024) (*Powertech*).

The Board's decision resolved most of the issues in the Tribe's previous petition and specified only a limited scope of remand: the Board directed the Region to apply "the correct legal standard for developing the record." *Id.* at 46. During the Region's six-month review following remand, multiple staff devoted significant time to a detailed search and review of records dating back over a decade to determine whether there were additional documents that should be added to the administrative record. The Region's review led to inclusion of additional documents in the administrative record; however, upon review and consideration of the documents, the Region found there were no new issues or substantial new questions raised and reissued the permits with no changes. *See* Certified Administrative Record (AR) Index; Attachment A, Doc 1152, Bates p. 098840; Attachment B, Doc 1153, Bates p. 098843.

For the reasons set forth below, the Board should deny review of the Petition. It brings claims beyond the scope of appeal on remand, does not meet threshold procedural requirements

for review, and does not demonstrate that Region 8's permit decisions were clearly erroneous or otherwise warrant review.

STATUTORY AND REGULATORY FRAMEWORK

A. SDWA

Congress enacted the SDWA in 1974 to ensure that the nation's sources of drinking water are protected against contamination and "to prevent underground injection which endangers drinking water sources." 42 U.S.C. § 300h(b). The SDWA directs EPA to promulgate regulations containing minimum requirements for state programs to protect underground sources of drinking water ("USDWs"). 42 U.S.C. § 300h. The UIC program regulations cover the construction, operation, permitting, and closure of injection wells used to place fluids underground. 40 C.F.R. parts 144-148. In states without an approved UIC program, EPA directly implements the UIC regulations and issues permits. 40 C.F.R. § 144.1(e). Because the State of South Dakota has not received approval to implement the UIC Program for Class III or V wells, EPA Region 8 is the permitting authority in South Dakota. *See* 40 C.F.R. § 144.1(e); 40 C.F.R. §§ 147.1(a-b), 147.2101. There are also procedural permitting regulations for the UIC program at 40 C.F.R. part 124. The SDWA requires a person to obtain a permit to operate an underground injection well unless the well is authorized by rule. 42 U.S.C. § 300h-3(b), 40 C.F.R. § 144.11. Central to the permitting requirements in the UIC regulations is a stringent non-endangerment standard. These regulations prohibit injection activities that allow the movement of fluid containing contaminants into a USDW if the presence of the contaminant may cause a violation of drinking water standards or otherwise adversely affect human health. 40 C.F.R. §§ 144.1(g), 144.12. The regulations define six classes of wells. Class III wells are defined as injection wells for the extraction of minerals including "[i]n situ production of uranium or other metals." 40 C.F.R. § 144.6(c)(2). Class V wells are defined as wells that are not included in any other class. 40

C.F.R. § 144.6(e). UIC regulations also allow EPA to exempt an aquifer or a portion of an aquifer when certain criteria are met and to permit activities such as in-situ mining in exempt aquifers, where it can be done in a manner that is protective of USDWs outside of the exempt portion of the aquifer. 40 C.F.R. § 146.4. Once EPA approves an aquifer exemption, the exempt portion is no longer considered a USDW as defined in 40 C.F.R. § 144.3, and it is not protected as a USDW under UIC regulations.

B. National Historic Preservation Act

The National Historic Preservation Act of 1966 ("NHPA") establishes a comprehensive set of programs to increase knowledge, and promote the preservation, of the Nation's historic and cultural resources. Section 106 of the NHPA requires federal agencies to take into account the effects of their undertakings on historic properties, and to give the Advisory Council on Historic Preservation ("ACHP") – the federal agency charged with administering section 106 – a reasonable opportunity to comment on such undertakings. 54 U.S.C. § 306108. Under regulations promulgated by the ACHP, section 106 consultations are generally conducted with State and Tribal historic preservation officials in the first instance, with opportunities for direct ACHP involvement in certain circumstances. 54 U.S.C. § 304108; 36 C.F.R. part 800. The statute and regulations establish a variety of important roles for Indian Tribes, including requiring federal agencies to consult with Tribes that attach religious and cultural significance to historic properties as the agencies carry out their responsibilities under section 106. 54 U.S.C. § 302706; 36 C.F.R. § 800.2(c)(2)(ii). Where more than one federal agency is involved in an undertaking, the ACHP regulations provide that some or all of the agencies may designate a lead agency to act on their behalf and fulfill their collective responsibilities under section 106. 36 C.F.R. § 800.2(a)(2). The section 106 process typically concludes either with findings that no

historic properties will be affected or adversely affected, or with agreements entered into by the consulting parties to address the resolution of adverse effects identified during the consultation process. *See* 36 C.F.R. §§ 800.4(d), 800.5(d), 800.6, 800.14(b).

The Region provides this background because Petitioners are attempting to raise NHPA allegations to the Board. Importantly, however, as explained below, the Board has already disposed of these issues in prior orders, and has expressly limited the scope of available remaining review to non-NHPA matters.

FACTUAL AND PROCEDURAL BACKGROUND

Powertech submitted a final Class III area permit application to Region 8 in January 2013 and a final Class V area permit application in January 2012 for the purpose of operating an in-situ recovery (ISR) of uranium facility. Powertech also submitted a request for an aquifer exemption of the mining portion of the Inyan Kara aquifers to allow injection into the Class III wells. The project site is in the southern Black Hills in South Dakota in southwest Custer and northwest Fall River Counties, approximately 13 miles northwest of Edgemont, South Dakota, and 46 miles west of the western border of the Pine Ridge Indian Reservation.

The project will involve the injection of lixiviant, consisting of groundwater from the injection zone with added oxygen and carbon dioxide, into uranium ore deposits within the Inyan Kara Formation targeted by 14 wellfields. These wellfields will consist of approximately 1,500 Class III injection wells, which will be used to inject the lixiviant into the uranium ore zones. The lixiviant will mobilize uranium from the ore deposits and allow production wells to pump the uranium-bearing lixiviant out of the ground to a processing unit where the uranium will be removed from the solution using an ion exchange resin. The barren lixiviant will be pumped from the processing unit back to the ISR wellfield, where oxygen and carbon dioxide will be added before injection back into uranium ore deposits through the Class III wells.

The Class V permit authorizes the construction and operation of up to four deep Class V disposal wells within the Class V Area Permit Boundary. The purpose of these wells is to inject waste fluids from the Dewey Burdock project ISR process into the Minnelusa aquifer.

Region 8 first issued draft permit decisions and a proposed aquifer exemption decision on March 6, 2017. Originally, the public comment period was scheduled to end on May 19, 2017, but after requests for extension of the comment period, Region 8 extended it until June 19, 2017. The Region received many comments. Following review of the comments, Region 8 made several changes to the Class III and V draft permits and aquifer exemption proposal. Given the high level of public interest and the number of changes made to the draft permits and proposed aquifer exemption, the Region issued new draft permits and a new proposed aquifer exemption for public comment on August 26, 2019. The public comment period was scheduled to conclude on October 10, 2019, but Region 8 extended it until December 11, 2019, due to public request. Following review of the public comments and information submitted, the Region issued final permit decisions on November 24, 2020. The Tribe filed a petition challenging the permits on December 24, 2020 ("2020 Petition"), under 40 C.F.R. § 124.19.

After initial briefing on the 2020 Petition, in November 2023 the Board issued an order denying review under section 106 of the NHPA. 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 re Powertech (USA) Inc.*, UIC Appeal No. 20-01 (Nov. 16, 2023) ("November 2023 Order"). After further briefing and oral argument, the Board issued a final decision denying review of the Tribe's NHPA section 110 claim and National Environmental Policy Act ("NEPA") claims, incorporating the November 2023 Order into its final decision. *Powertech*, 19 E.A.D. at 25 n.1. In addition, the

Board issued a partial remand, requiring the Region to address errors in the administrative record. On remand, the Region conducted a review of agency records to determine whether any additional materials in existence as of the date the original permits were issued in 2020 should be part of the administrative record under 40 C.F.R. § 124.18. As a result of this review, the Region updated the administrative record by including early Class III and Class V permit application documents and additional communication documents, and issued a Determination on Remand and a revised Response to Comments ("RTC"). Pursuant to the Board's Order, the Region re-issued the permits on March 14, 2025. The content of the permits did not change. *See* Certified AR Index; Attachment A, Doc 1152, Bates p. 098840; Attachment B, Doc 1153, Bates p. 098843.

PRINCIPLES GOVERNING BOARD REVIEW

A. Scope of the Appeal After Remand

As explained above, the Board has already resolved and denied review of many issues related to this matter. Accordingly, the Board's September 2024 decision expressly limits the scope of issues available for further review: "[a]ny such appeal shall be limited to the issues considered on remand and any modifications made to the permits as a result of the remand." *Powertech*, 19 E.A.D. at 46 n.23. These issues were described in the Board's partial remand, which instructed the Region:

> to apply the correct legal standard for developing the administrative record, ensure that the record includes all materials required by the part 124 regulations, consider any comments received on the parts of the permit decisions not disposed of by this order in light of any updated record, revise its response to comments document, and take further action, as appropriate, consistent with the part 124 regulations, in reissuing its permit decisions.

Id. at 46. The Board explained that because of errors in the administrative record for the 2020 permits, the Board could not reach the merits of the remaining issues, and therefore preserved for review:

> (1) the SDWA issues addressed in the petition, including the Tribe's challenges to the Region's cumulative effects analysis under EPA's UIC regulations at 40 C.F.R. § 144.33(c)(3), and
> (2) the Tribe's de facto rulemaking claim.

Id. at 46, n.23 [paragraph structure added]. Thus, the Board required EPA to reissue the permit decisions after correcting the record, and preserved for review only two claims from the original Petition. The Board's remand did not reopen the entire content of the permits and require EPA to conduct a new analysis as if acting on the permit applications for the first time. *See In re Knauf Fiber Glass*, 9 E.A.D. 1, 7 (EAB 2000) (limiting review to "issues that were the subject of our remand order," noting that the scope of review did not include "issues that were specifically addressed and for which review was denied in *Knauf I*," and stating that "issues may not be raised at this juncture because the scope of the remand was expressly limited"); *In re Adcom Wire,* 1994 EPA App. Lexis 28, *5 (EAB May 24, 1994) (Where the Board instructed the Region to independently evaluate the basis of its federal jurisdiction and to reopen the comment period if it concluded that the Region has federal jurisdiction over Adcom, "the Board did not question or require the Region to reconsider any other aspects of the permit.").

As explained in the Argument section, several of Petitioners' claims exceed the limited scope of this appeal.

B. Standard Of Review

The standard of review for appeal of EPA-issued UIC permits is governed by 40 C.F.R. § 124.19 and related provisions. In considering an appeal brought under this regulation, the Board first evaluates whether the petitioner has met key threshold procedural requirements,

including standing and issue preservation. *See* 40 C.F.R. §§ 124.13, 124.19(a)(2)-(4). As to standing, "[a]ny person who filed comments on the draft permit or participated in a public hearing on the draft permit may file a petition for review as provided in this section." 40 C.F.R. § 124.19(a)(2). Those failing to provide comments or participate in a public hearing may petition for review, "but only to the extent that those final permit conditions reflect changes from the proposed draft permit." *Id.* To establish that it has preserved an issue for appeal, a petitioner must show that it raised the issue "with reasonable specificity" during the comment period. *In re Indeck-Elwood, LLC*, 13 E.A.D. 126, 143 (EAB 2006).

Once threshold procedural requirements are satisfied, the petitioner bears the burden of demonstrating that review is warranted. 40 C.F.R. § 124.19(a)(4). "A petition for review must identify the contested permit condition or other specific challenge to the permit decision and clearly set forth, with legal and factual support, petitioner's contentions for why the permit decision should be reviewed." 40 C.F.R. § 124.19(a)(4)(i); *In re Jordan Dev. Co., LLC*, 18 E.A.D. 1, 4 (EAB 2019), citing *In re Archer Daniels Midland Co.*, 17 E.A.D. 380, 382-83 (EAB 2017). As the Board has explained in this matter, a "petitioner must demonstrate that the permit decision is based on a clearly erroneous finding of fact or conclusion of law or involves an exercise of discretion that warrants review under the law." *Powertech*, 19 E.A.D. at 30.

To meet this standard, a petition must meet a minimum level of specificity. 40 C.F.R. § 124.19(a)(4)(i); *see also* Guide to the U.S. Environmental Protection Agency's Environmental Appeals Board (March 2023) at 14 ("The petition for review should identify the specific aspects of the permitting decision being challenged."). It is not enough for a petitioner to rely on previous statements of its objections during the administrative process, such as comments on a draft permit; it must demonstrate why the permit issuer's response to those objections is clearly

erroneous or otherwise warrants review. *See* 40 C.F.R. § 124.19(a)(4)(ii). "If the petition raises an issue that the Regional Administrator addressed in the response to comments document issued pursuant to §124.17, then petitioner must provide a citation to the relevant comment and explain why the … response was clearly erroneous or otherwise warrants review." *Id.*; *see, e.g., In re Peabody W. Coal Co.*, 12 E.A.D. 22, 33 (EAB 2005) ("[P]etitioner may not simply reiterate comments made during the public comment period, but must substantively confront the permit issuer's subsequent explanations.").

In seeking review of a permit based on fundamentally technical or scientific matters, the Board generally defers to the permit issuer, as long as the permit issuer adequately explains its rationale and supports its reasoning in the administrative record. *In re Muskegon Dev. Co.,* 18 E.A.D. 88, 90 (EAB 2020) (citing *In re Jordan Dev. Co.*, 18 E.A.D. at 5).

ARGUMENT

A. SDWA

1. Adequacy of groundwater quality information and hydrogeological analysis

Petitioners raise SDWA arguments by reference to pages 34-45 of the 2020 Petition. To the extent Petitioners are challenging the adequacy of groundwater quality information and hydrogeological analysis, and the Board determines that these arguments were properly preserved, the Region incorporates by reference the entirety of its arguments on the adequacy of groundwater quality information from its original Response on pages 17-21, and the entirety of its arguments on the adequacy of hydrogeological analysis on pages 22-29. *In re Powertech (USA) Inc.*, UIC Appeal No. 20-01, Region 8's Response to Petition for Review, December 22, 2023 ("Original Response").

2. Cumulative effects analysis ("CEA") under 40 CFR § 144.33(c)(3)

The Board should deny review of Petitioners' cumulative effects analysis arguments because Petitioners have not demonstrated that the Region's cumulative effects analysis was clearly erroneous or otherwise warrants review, and because Petitioners' new arguments about consideration of additional documents not before the Region are outside the scope of the remand and issues preserved for appeal. The Region generally notes the lack of specificity and clarity in Petitioners' cumulative effects arguments, as discussed in this section. For instance, Petitioners explicitly incorporate the Tribe's NEPA arguments, offer arguments that rely on invalid assumptions, and make some arguments through implication only. The Region interpreted Petitioners' arguments to the best of its ability and responds as follows.

a. The Region's extensive CEA meets the requirements of 40 CFR § 144.33(c)(3).

In the September 2024 Order, the Board found that any review of the Region's CEA should be analyzed pursuant to the SDWA UIC regulations at 40 C.F.R. § 144.33(c)(3). *Powertech*, 19 E.A.D at 40 n.13 ("The Tribe's challenge to the Region's cumulative effects analysis that the Region conducted pursuant to the SDWA UIC regulations at 40 C.F.R. § 144.33(c)(3) … should be analyzed under the UIC regulations, not NEPA."). However, in challenging the Region's cumulative effects analysis in the present Petition, Petitioners have only incorporated by reference the Tribe's 2020 Petition arguments from pages 25-31. This section of the 2020 Petition is titled "NEPA's Cumulative Impacts Mandate is Not Satisfied" and addresses the Tribe's NEPA challenge regarding the adequacy of the CEA, which the Board previously resolved in favor of the Region. *See Powertech*, 19 E.A.D at 37-42. Petitioners continue to entangle the NEPA and SDWA arguments, although the Board explicitly denied review of all the Tribe's NEPA claims, including those related to the CEA. *Id.* at 40 ("[I]t is well

settled that the SDWA and the UIC permitting program are the functional equivalent of NEPA, and § 124.9(b)(6) is dispositive on the question of the UIC permit program's functional equivalence to NEPA …. The Region needed only to ensure that it complied with the requirements of the SDWA and UIC permitting program, not NEPA"). The Region opposes any incorporation by reference to or reliance by the Petitioners on arguments related to NEPA.

In responding to the Petitioners' challenge regarding the adequacy of the CEA conducted consistent with the requirements of 40 C.F.R. § 144.33(c)(3), the Region incorporates by reference the cumulative effects arguments related to SDWA claims from its Original Response. Original Response, pp. 21-22, 27.

The requirement to consider cumulative effects in the UIC regulations is related to issuance of area permits under 40 C.F.R. § 144.33. That regulation specifies that "the area permit may authorize the permittee to construct and operate, convert, or plug and abandon wells within the permit area provided (3) [t]he cumulative effects *of drilling and operation of additional injection wells* are considered by the Director during evaluation of the area permit application and are acceptable to the Director." 40 C.F.R. § 144.33(c)(3) (emphasis added).

The CEA conducted by the Region is consistent with 40 C.F.R. § 144.33(c)(3) and takes "into account the cumulative effects of drilling and operation of the additional injection wells proposed under an area permit during evaluation of the permit application." Attachment C, Doc 367, Bates p. 027908. The RTC articulates the same: the CEA conducted pursuant to 40 C.F.R. § 144.33(c)(3) is limited to cumulative effects of the drilling and operation of additional injection wells consistent with the applicable regulation. *See, e.g.*, Attachment D, Doc 001, Responses #238 Bates pp. 000274-000275, #267 Bates p. 000321, #307 Bates pp. 000356-000357, #330 Bates p. 000369. As discussed in the RTC, the issues required to be considered in the CEA were

limited to "those potential environmental effects at or near the project site that occur close in time with the drilling and operation of the injection wells." Attachment D, Doc 001, Response #238 Bates pp. 000274-000275.

The Region's interpretation of "cumulative effects of drilling and operation of additional injection wells" in developing its CEA for these permits is consistent with the limits of EPA's authority under the SDWA and UIC regulations. As the Board has consistently held, the UIC permitting process is:

> narrow in its focus and the Board's review of the UIC permit decisions extends only to the boundaries of the UIC permitting program, which is limited to the protection of underground sources of drinking water." *In re Sammy-Mar, L.L.C*,, 17 E.A.D. 88, 98 (EAB 2016) (quoting *In re Bear Lake Props*., 15 E.A.D. 630, 643-44 (EAB 2012)). The SDWA and the UIC regulations establish the only criteria EPA may use in establishing permit requirements. *In re Envotech, L.P.*, 6 E.A.D. 260, 264, 276 (EAB 1996); *In re Federated Oil & Gas*, 6 E.A.D. 722, 725 (EAB 1997).

In re Panoche Energy Ctr., 18 E.A.D. 818, 862 (EAB 2023). Many of the issues raised by Petitioners, such as how processed waste is transported to another state, or mineral development dozens of miles away, are not associated with the drilling and operation of additional wells and are beyond considerations related to the protection of underground sources of drinking water.

The Region in this case did an extensive review of cumulative effects. The CEA covers environmental impacts up to 20 miles beyond the Dewey-Burdock Project Boundary. Attachment C, Doc 367 Bates p. 027908. The Region used this boundary based upon a review of environmental impacts from the drilling and operation of additional wells, which found that the furthest reaching environmental effect was in the air context. This was based on the air models including the predicted impacts on Wind Cave National Park. *Id*. As reflected in the administrative record, the Region considered over a hundred sources in evaluating cumulative effects, including the NRC's Supplemental Environmental Statement for the Dewey Burdock

Project. *See* Certified AR Index, pp. 20-25, Docs 370 to 480. Given the foregoing, the Region's selection of a 20-mile boundary was reasonable and supported by significant information in the administrative record.

Petitioners' arguments about cumulative effects are characterized in generalities and do not directly address the scope of 40 C.F.R. § 144.33(c)(3). Petitioners' brief does not include a proposed alternate legal interpretation of 40 C.F.R. § 144.33(c)(3) which the Region could address. Because of this, the Region can only assume that reference to pages 25-31 of the 2020 Petition means that they believe that the scope of cumulative effects under the UIC regulations mirror that under NEPA. As the Board has pointed out, "the Region does not need to conduct a [NEPA] 'functional equivalence test' each time it issues a UIC permit as that runs directly counter to the well-settled doctrine of functional equivalence." *Powertech*, 19 E.A.D at 40.

Instead of articulating a specific argument about the appropriate scope of cumulative effects required to be considered under 40 C.F.R. § 144.33(c)(3), Petitioners list a broad array of issues they believe are not adequately considered by the Region, most of which are a reiteration of comments they submitted and to which the Region responded in the RTC.

The Region addresses the items below:

- *"lacks a competent cumulative effects analysis to impacted environmental resources such as groundwater, air, wildlife, and cultural resources"* 2020 Petition at 25.

The Petition does not meet the standard of review regarding its air and wildlife claims. There is no further elaboration on these issues, and therefore these arguments do not meet the minimum level of specificity required under the standard of review. With regard to cultural resources, the Petitioners do not meet the standard of review because they failed to confront the Region's Response # 297 and explain why it is clearly erroneous. Attachment D, Doc 001, Bates

p. 000348-000349. For groundwater issues, the Region refers to and incorporates its Original Response on pages 21 and 27.

- *"the applicant has recently released documents that demonstrate planned expansions of the disturbed area from the project in the form of entire additional wellfields" 2020 Petition at 26; "For instance, Powertech has proposed opening satellite mines, including in the Dewey Terrace area ...."* 2020 Petition at 29.

The Region considered comments related to other potential mine sites nearby and addressed this in the RTC at Response #285. Attachment D, Doc 001, Bates p. 000330-000331. The response explains that potential development that commenters refer to near the Dewey Burdock project is outside the scope of the required cumulative effects analysis, as they are merely speculative. Additionally, if Powertech wants to expand in the future, it may require permit modifications and a re-evaluation of cumulative effects if the projects are under EPA's authority. Petitioners do not confront this response or attempt to explain why it is clearly erroneous. Finally, the Region notes that even if additions were not under EPA's authority, the UIC regulations allow for modification of the Dewey Burdock permit if future information indicates that cumulative effects on the environment are unacceptable. *See* 40 C.F.R. § 144.39(a)(2).

- *"Storage issues, including radon emissions are not addressed, but rather left for in the Clean Air Act, NESHAP Subpart W permit, with no plans for permanent disposal of the radioactive solids." 2020 Petition* at 27.

The Petition does not meet the standard of review on this issue because it does not meet the minimum level of specificity required. The Region has no way to know what the Petitioners mean by "storage issues" with the exception of the radon emissions example. Radon emissions are discussed in Response #327 and 341. Attachment D, Doc 001, Bates pp. 000367, 000375. Waste is discussed at Response # 271. Id., Bates p. 000323. Petitioners fail to confront these responses and explain why they are clearly erroneous or otherwise warrant review.

- *"The CEA also fails to adequately discuss or review the cumulative effects associated with the transport of radioactive byproduct waste to the White Mesa Mill in Utah."* 2020 Petition at 27.

The RTC addresses comments about White Mesa Mill in Responses #238, 330, and 331. Attachment D, Doc 001, Bates pp. 000274-000275, 000369-000370. The Region explains that the potential use of White Mesa Mill to dispose of 11e.2 waste is too remote in time and too far away from the injection wells to be reasonably considered as cumulative effects of drilling and operation of additional wells. The Region also explained that based on the information in the administrative record, the use of White Mesa Mill is speculative, as Powertech was not required to dispose of 11e.2 waste at that site. The Petitioners do not confront the Region's responses to comment and explain why they are clearly erroneous or otherwise warrant review.

- *"The cumulative effects analysis also fails to account for . . . additional projects proposed near the Dewey-Burdock property" 2020 Petition* at 29.

To the extent possible, the Region addressed this issue in Response #285. Attachment D, Doc 001 Bates p. 000330-000331. However, the Petition does not meet the standard of review, as it is not clear about what additional projects they believe needs to be addressed in the CEA. Therefore, this does not meet the minimum level of specificity required under the standard of review.

- *"the mineral exploration and development activities around the Black Hills must undergo cumulative effects review, given the spiritual and cultural import Lakota people place on the Black Hills as a whole" 2020 Petition* at 30-31.

As explained above, the Region's CEA included an expansive review of cumulative effects from the additional drilling and operation of additional wells, which found that the furthest reaching environmental effect was in the air context, a maximum of 20 miles out from the project boundary. Petitioners raise a list of mostly non-specified potential developments in the region with no explanation of what effects it might have in common with the Dewey Burdock

project or why they are reasonably within the scope of the 40 C.F.R. § 144.33(c)(3) considerations. Therefore, this argument lacks the minimum level of specificity required under the standard of review.

- *"The Black Hills Ordnance Depot also requires cumulative impacts analysis." 2020 Petition* at 31.

The Region reviewed a comment about the Black Hills Army Depot (BHAD) and assessed it in the groundwater context, as the comment was only about groundwater concerns. The Region concluded that due to the fact that the BHAD is 14 miles south of the Dewey Burdock project, there will be no groundwater effects from the project on the BHAD. Attachment D, Doc 001, Response V, Bates p. 000406. The CEA specifies that "Based on these protective permit requirements, EPA concludes that there will be no groundwater quality impacts from ISR operations to the Inyan Kara aquifers outside the aquifer exemption boundary and there will be no impacts to the Madison aquifer, or any other USDWs, from the authorized deep well injection activities." Attachment C, Doc 367, Bates pp. 027926-027927. The Petitioners do not confront this response to comment and explain why it is clearly erroneous.

The Board should deny review of the Petitioners' cumulative effects analysis arguments because Petitioners have not demonstrated why the Region's CEA and RTC are clearly erroneous or otherwise warrants review.

b. Petitioners' new cumulative effects arguments are outside the scope of the Board's limited remand and issues preserved for appeal.

The Region agrees that the Board preserved Petitioners' SDWA arguments, including challenges to the Region's CEA under 40 C.F.R. § 144.33(c)(3). However, Petitioners attempt to include a new argument in their Petition by implying that the Region was required to reopen and re-evaluate the cumulative effects during the remand, even though the scope of the remand was limited to addressing the administrative record issues identified by the Board. *See* Petition at 26-

27 (raising new documents for consideration that did not exist before the Region issued permits in 2020 and arguing the Region "fails" to consider them in its CEA). This new argument is outside the scope of the Board's limited remand and issues preserved for appeal.

The Board remanded the 2020 permits to the Region to "apply the correct legal standard for developing the administrative record, ensure that the record includes all materials required by the part 124 regulations" and then consider comments in light of any updated record, and take any further appropriate action consistent with part 124. *Powertech*, 19 E.A.D. at 24. Consistent with this, the Board also limited an appeal to the decision on remand "to the issues considered on remand and any modifications made to the permits as a result of the remand." *Id* at n.23. Petitioners' arguments that the Region must reopen and re-assess cumulative effects is outside the scope of the remand and the appeal because review and consideration of the documents added to the administrative record raised no new issues that would necessitate reopening the CEA. *See* Attachment A, Doc 1152, Bates p. 098840.

c. Additional public notice and comment is not warranted.

Petitioners argue that the Board should remand the permits to the Region to allow for additional public comment and proffers seven documents that it claims the EPA must consider in its CEA and that the public must have an opportunity to review and comment on. The Petition claims that because "the documents referred to and cited herein, and attached hereto, have come into existence in the intervening five and half [sic] years, there was no reasonable opportunity for Petitioners to raise them." Petition at 30.

Petitioners' argument fails for two reasons. First, the Region was not required to reopen the permits and CEA on remand as if the Region had to start the permitting process again. As explained above, the Region was not required to do this, as the scope of the remand was limited. *See e.g. In re Adcom Wire,* 1994 EPA App. Lexis 28, *3-6 (Where the Board's remand order

stated that if the Region concludes that it has hazardous and solid waste amendments jurisdiction it must reopen the record for comments on its jurisdictional determination, it did not mean the Region had to reconsider any other aspect). Second, the documents that Petitioners contend should have been added to the record for new comment were either in the record at the time of the Region's November 24, 2020 decision[1] or post-date the decision and therefore were not before the Region at the time of the permit decisions.

The Region's authority to reopen a public comment period is discretionary. The regulations specify that a Regional Administrator "may" reopen a comment period if any data, information or arguments submitted during the public comment period "appear to raise substantial new questions." 40 C.F.R. § 124.14(b); *see In re NE Hub Partners, LP,* 7 EAD 561, 585 (EAB 1998) ("The critical elements of this regulatory provision are that new questions must be 'substantial' and that the Regional Administrator 'may' take action. The Board has long acknowledged the deferential nature of this standard."). The Board has applied this same standard to cases on remand. *See In re Dominion Energy Brayton Point, LLC*, 13 E.A.D. 407, 415 (EAB 2007). In this case, in accordance with the Board's limited scope of remand, the Region reviewed its existing records and determined there were some additional documents that should have been included in the administrative record. However, as explained in the Region's Determination on Remand, none of the documents added to the record raised new issues or substantial new questions. Attachment A, Doc 1152, Bates p. 098842. Therefore, the Region

[1] The first three documents the Petitioners raise to support this claim (identified as Attachments 14, 15, and 16 in their Petition) were in the original administrative record. Contrary to the Petitioners' statement that they had "no opportunity to raise them" (Petition at 30), Petitioner Oglala Sioux Tribe submitted Attachments 14 and 16 as comments in 2019. Attachment E, Doc 574 excerpts, Bates pp. 061163-67 and 061303-09. Attachment 15 was considered by the Region in its evaluation of the application and cumulative effects, is in the record as Document 441, and was available for comment during the public comment period. Certified AR index, p. 23. The Region responded to these comments in the original Response to Comment (RTC) at Response #285. Attachment D, Doc 001, Bates p. 000331.

decided not to exercise its discretion to reopen the permits for additional public notice and comment. Petitioners do not argue that the documents added to the record raise substantial new questions. Petitioners have not demonstrated that the Agency's exercise of discretion warrants review under the law.

d. Petitioners' attempt to supplement the record with four new documents that were not before the Region and are not relevant to the Permit decisions must be denied.

The additional four documents offered by the Petitioners are not part of the administrative record for the permits, do not relate to the narrow issues on remand, and thus the attempt to supplement the administrative record with these documents should be denied. As the Board has previously held, the administrative record for an agency decision includes "all documents, materials, and information that the agency relied on directly or indirectly in making its decision." *In re Dominion Brayton Point*, 13 E.A.D. at 417. These documents were not before the Region when the original permits were issued on November 24, 2020, or when the permits were re-issued on March 14, 2025. As specified by 40 C.F.R. § 124.18(c), "[t]he record shall be complete on the date the final permit is issued." The limited scope of remand did not require the Region to reopen its record to seek out and consider new information unless the review and consideration of records on remand triggered additional action. As none of these documents were before the Region at the time of the decisions, it could not have considered this information in making its decision. Petitioners cite to 40 C.F.R. § 124.13 to argue for supplementation of the record and for reopening of the public comment period, explaining that these documents did not exist at the time of public comment. However, the Board has previously addressed this issue and declined to consider post-decision information developed after final permit issuance, stating that to accept such information "would be to invite unlimited attempts by [challengers] to reopen and supplement the administrative record after the period for submission of comments has expired."

In the Matter of GMC, 5 E.A.D. 400, 405 (EAB 1994); *see also In re Dominion Brayton Point*, 13 E.A.D. at 417-418.

Additionally, they are not relevant to the permits, as the Board has already determined regarding three of the documents. Specifically, the Preliminary Economic Assessment (PEA) documents from December 2020 (Petition, Attachment 40), May 2021 (Petition, Attachment 42), and August 2021 (Petition, Attachment 41) are the same three documents the Tribe used in its effort to Amend its 2020 Petition. In denying the Tribe's Motion to Amend, the Board specifically stated that "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*." In re Powertech*, UIC Appeal No. 20-01, November 2023 Order at 14 (emphasis added). In making this ruling, the Board also noted that the documents described proposals and cautioned there is no certainty that they will be realized, the Tribe acknowledged this, the documents themselves discuss the need for more permitting, and the UIC permits and UIC regulations require Powertech to get a modification of the permits to change the scope of the authorization. The Board found that the Tribe's request to amend the petition based on the three PEAs to be "an impermissible attempt to bolster the initial petition." *Id.* at 16. The fourth document (Petition, Att. 43) includes more of the same type of speculative information. The brief sentence highlighted by Petitioners specifically indicates only that Encore has engaged in some resource development drilling at the Dewey Terrace site. However, just as with the PEA documents, this does not indicate any certainty in development at Dewey Terrace, as development would first require submission of permit applications to appropriate authorities.[2]

[2] As the Region explained in its Response to Petitioner's Motion to Amend Petition for Review:

> The Class III and V permits issued by Region 8 are based on the project as described in the permit application and are summarized in detail in the accompanying fact sheets. If Powertech chooses to modify

These documents are not properly part of the administrative record, and the Board should deny supplementation of the record with these additional documents.

In conclusion, the Board should deny review of the Petitioners' cumulative effects claims, as the Petition failed to demonstrate that the Region's evaluation of cumulative effects is clearly erroneous or otherwise warrants review.

B. Administrative Law Issues

1. The Board should deny review of Petitioners' de facto rulemaking claim because Petitioners do not explain why the Region's response to comments is clearly erroneous or otherwise warrants review, and the documents at issue do not constitute legislative rulemaking requiring notice and comment under the Administrative Procedure Act.

Petitioners argue that certain documents[3] created before 2010 in the ordinary course of the permitting process violated Administrative Procedure Act (APA) requirements regarding notice-and-comment rulemaking. At the outset, the Region incorporates by reference its arguments regarding rulemaking from pp. 31-32 of the Original Response and notes that the Board's jurisdiction has historically been limited to "evaluation of specific UIC permit terms and the permit issuer's compliance with the SDWA and UIC permit regulations." *In re Envtl.*

> its project in the future beyond the scope of the issued permits, it will have to seek permit modifications in accordance with the UIC regulations at 40 C.F.R. § 144.39 and will have to submit appropriate information and documentation to Region 8 for review at that time …. Such potential future modifications are not relevant to the permits at issue in this case, and thus the PEA documents are outside the scope of the issued Class III and V permits before the Board.

In re Powertech, UIC Appeal 20-01, Response to Petitioner's Motion to Amend Petition for Review at 10 (May 8, 2023).

[3] Petitioners cite to the documents at issue by referencing the 2020 Petition attachments rather than citing to the document and Bates numbers in the certified AR index for the original action. The Region believes the documents are: 2020 Petition (OP) Attachment 1 (AR Doc 644 Bates 080819-080854); OP Attachment 2 (AR Doc 574 Bates 061126, 0611154-061161, 061482-061516, 061150-061153, 061127-061149); OP Attachment 29 (AR Doc 644 Bates 082551-82552); OP Attachment 30 (AR Doc 644 Bates 082488); OP Attachment 31 (AR Doc 644 Bates 082550); OP Attachment 32 (AR Doc 644 Bates 082856-082939); OP Attachment 33 (AR Doc 644 Bates 082556-082854); OP Attachment 34 is not part of the administrative record and includes documents unrelated to the permits at issue here, as discussed below.

Disposal Systems, Inc., 12 E.A.D. 254, 267 (EAB 2005) (citing *In re Puna Geothermal Venture*, 9 E.A.D. 243, 258-159 (EAB 2000); *In re Terra Energy Ltd*., 4 E.A.D. 159, 161 & n.6 (EAB 1992)); *see also In re Penneco Environmental Solutions, Inc.,* 19 E.A.D. 105, 122-123 (EAB 2024) citing *In re Chevron Mich. LLC*, UIC Appeal No. 13-03, at 19 (EAB Nov. 7, 2013) (Order Denying Review) (stating that a permit appeal is not the appropriate avenue for petitioners to question the structure of the UIC regulations or the policy judgments underlying them). Any argument that a rulemaking is necessary falls outside the scope of evaluation of the Region's compliance with the SDWA and UIC permit regulations, and therefore any such claim should be denied by the Board.

With respect to the claim of de facto rulemaking raised by Petitioners, the Board should also deny review of Petitioners' claim because Petitioners have not met the threshold standard of review to explain why the Region's RTC is clearly erroneous or otherwise warrants review in accordance with 40 C.F.R. § 124.19(a)(4)(ii). In addition, the documents at issue do not constitute legislative rulemaking requiring notice and comment procedures under the APA. Lastly, EPA has discretion to create regulatory standards through notice-and-comment rulemaking or through individual adjudications, like permits. Therefore, Petitioners have not met their burden to demonstrate that the permit decision is based on a clearly erroneous finding of fact or conclusion of law or involves an exercise of discretion that warrants review under the law. 40 C.F.R. § 124.19(a)(4)(i); *Powertech*, 19 E.A.D at 30. The Board should dismiss Petitioners' claim regarding de facto rulemaking.

Petitioners merely reiterate their comments from the comment period and fail to address the Region's response to comment regarding the documents Petitioners believe constitute unlawful de facto rulemaking. The documents identified by the Petitioners are not agency policy

or guidance; they were created by Regional program staff, primarily identify and quote the relevant regulations, and were used to explain the site-specific information required by the existing regulations at 40 C.F.R. §§ 144.7 and 146.4 (aquifer exemptions (AEs)) and 40 C.F.R. § 146.6 (area of review (AOR)) as part of the permitting process. *See e.g.*, Attachment B, Doc 1153, Bates p. 098844-45. Further, the Region explained that the AOR regulation explicitly contemplates that the Region can solicit input from industry to determine the AOR. *Id*. at 098845. While Petitioners acknowledge that the Region responded to their comment ("EPA Region 8 instead simply restates its legal position that the communication and information exchange between the Applicant and Region 8 was a normal pre-application process it follows in every circumstance with a potential permit applicant" (Petition at 11)), Petitioners do not explain why the Region's revised response to comment is clearly erroneous or otherwise warrants review as required by 40 C.F.R. § 124.19(a)(4)(ii). The Board should dismiss the de facto rulemaking claim.

In addition, Petitioners have not met their burden to demonstrate that the permit decision is based on a clearly erroneous finding of fact or conclusion of law or involves an exercise of discretion that warrants review under the law. *Powertech*, 19 E.A.D at 30. The documents identified by Petitioners do not constitute binding legislative rules subject to notice-and-comment rulemaking under APA section 553, and therefore the Board should dismiss Petitioners' de facto rulemaking claim. Legislative rules generally require notice and comment, but interpretive rules and general statements of policy do not. 5 U.S.C. § 553(b)(A). The Regional staff-generated documents identified by Petitioners do not even rise to the level of interpretive rules and general statements of policy issued by the Agency, let alone constituting

legislative rules requiring notice and comment.[4] "A definitive and binding statement on behalf of [an] agency must come from a source with the authority to bind the agency." *Devon Energy Corp. v. Kempthorne*, 551 F. 3d 1030, 1040 (D.C. Cir. 2008). As Petitioners acknowledge, only the Administrator may promulgate SDWA regulations. Petition at 13. The identified documents are emails exchanged with regional staff early in the permitting process and draft documents prepared by regional staff as work began with the permittee on potential permit applications.

The documents raised by Petitioners were not issued by the Agency to advise the public of the agency's construction of the rules which it administers such that they could be considered interpretive rules pursuant to the APA. Rather, the documents are regional staff emails and regional draft documents that do not bind the agency. As such, the documents are not interpretive rules under the APA.

In addition, the documents at issue are not general statements of policy issued by the Agency. Even if the identified regional staff documents (rather than Agency-issued documents) created during the permitting process could somehow be construed as constituting a general statement of policy,[5] general statements of policy are not subject to the notice and comment requirements of the APA. Only legislative rules are required to undergo notice and comment, and

[4] "Interpretive rules are issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers. Interpretive rules do not carry the force and effect of law, and they need not be promulgated pursuant to notice and comment procedures under the APA." *Ass'n of Flight Attendants-CWA v. Huerta*, 785 F.3d 710, 716 (D.C. Cir. 2015) (internal citations omitted). "A policy statement explains how the agency will enforce a statute or regulation - in other words, how it will exercise its broad enforcement discretion or permitting discretion under some extant statute or rule. It serves to apprise the regulated community of the agency's intentions as well as informing the exercise of direction by agents and officers in the field. Policy statements are binding neither on the public nor the agency and the agency retains the discretion and the authority to change its position." *Id*. (internal citations omitted). "A legislative rule *modifies* or *adds* to a legal norm based on the agency's *own authority* flowing from a congressional delegation to engage in supplementary lawmaking …. A properly adopted substantive rule establishes a standard of conduct which has the force of law." *Id.* (internal citations omitted) (emphasis in original).

[5] "An agency action that merely explains how the agency will enforce a statute or regulation – in other words, how it will exercise its broad enforcement discretion or permitting direction under some extant statute or rule – is a general statement of policy." *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014).

the documents are not legislative rules. Under the caselaw, courts employ two overlapping formulations when deciding whether a document is a legislative rule or a statement of policy. *Croplife Am. v. EPA*, 329 F.3d 876, 883 (D.C. Cir. 2003). Under the first formulation, courts consider whether the agency action 1) imposes any rights and obligations or 2) genuinely leaves the agency and its decision makers free to exercise discretion. *Id.* The second formulation considers 1) the Agency's own characterization of the action; 2) whether the action was published in the *Federal Register* or the Code of Federal Regulations; and 3) whether the action has binding effects on private parties or on the agency. *Id.; see also GE v. EPA*, 290 F.3d 377, 382-383 (D.C. Cir. 2002). More recently, the D.C. Circuit has emphasized that "[t]he most important factor concerns the actual legal effect (or lack thereof) of the agency action in question on regulated entities." *Nat'l Mining Ass'n*, 758 F.3d at 252. The documents at issue here certainly did not bind the permittee, nor were there legal effects associated with these documents. The documents were generated by regional staff early on in the permitting process almost a decade before the draft permits were first issued for public comment. The documents did not create any rights or obligations and left the Agency free to exercise discretion when issuing the permits. Finally, the documents were not published in the *Federal Register*, nor in the Code of Federal Regulations.

The Region notes that once the draft permits were first provided for public comment in 2017 in accordance with the requirements of 40 C.F.R. § 124.10, the Tribe as well as Powertech commented on the permits. *See* Certified AR Index at pp. 30-35, Docs 581-628 (Powertech), 644 (Tribe). In addition, in response to public comments received on the 2017 draft permits, the Region revised the draft permits and re-public noticed them in 2019, providing another opportunity for Petitioners and Powertech to comment on the draft permits that would eventually

be the binding documents with legal effect when issued by the Region. *See* Certified AR Index at p. 30, Docs 574-580. In contrast, the regional staff documents identified by Petitioners had no such legal effect and are not subject to notice-and-comment rulemaking under the APA.

Finally, to the extent that the Petitioners are asserting that EPA inappropriately established standards through these documents or through its permit, that assertion is unsupported by the APA. The EPA retains discretion under the APA to choose between rulemaking and adjudication to the extent it is consistent with the underlying statute, such as permitting actions pursuant to the SDWA, in determining how to set regulatory standards. *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 294, 295 (1974) (In the context of a National Labor Relations Board case, "rulemaking would provide the Board with a forum for soliciting the informed views of those affected in industry and labor before embarking on a new course. But surely the Board has discretion to decide that the adjudicative procedures in this case may also produce the relevant information necessary to mature and fair consideration of the issues. Those most immediately affected, the buyers and the company in the particular case, are accorded a full opportunity to be heard before the Board makes its determination"). The Agency was not and is not required to conduct notice-and-comment rulemaking regarding the documents identified by Petitioners. With respect to Petitioners' de facto rulemaking claim, Petitioners have not met their burden to demonstrate that the permit decision is based on a clearly erroneous finding of fact or conclusion of law or involves an exercise of discretion that warrants review under the law. Therefore, the Board should dismiss Petitioners' de facto rulemaking claim.

2. Petitioners' argument that the Region failed to complete the administrative record and omitted information from the record does not meet the requisite legal standard, and the Board should deny review of this issue.

Petitioners' allegation that the Region "has failed to include any of the pre-application information and discussions in the administrative record" is incorrect. Petition at 14. As

explained in the Determination on Remand, the Region completed a detailed search and review of documents to ensure that all documents required to be in the administrative record per 40 C.F.R. § 124.18 were included. Attachment A, Doc 1152, Bates p. 098842. This search did not elicit any additional pre-application documents other than those already in the administrative record. As explained below, Petitioners have not offered any evidence to meet the high bar of bad faith or bias in decision-making, and their request "to remand to the agency for additional investigation or explanation" should be denied.

Petitioners' alleged evidence that the Region omitted records is Attachment 34 to the 2020 Petition. Petition at 13. The emails contained in Attachment 34 were not submitted to the Region during any comment period for the Dewey Burdock permits. These emails are not appropriately part of the Dewey Burdock administrative record, as they are not related to the Dewey Burdock site. The emails in Attachment 34 are about Powertech's Centennial project site in Colorado. No permits were issued for the Centennial site, and Powertech withdrew its applications for this site in 2011. Attachment 34 itself reveals that these emails are about the Centennial site, and not the Dewey Burdock site, as "Centennial Project" is mentioned on pages 115, 117, and 118. There is no mention of Dewey Burdock in Attachment 34. Even if the emails were related to the Dewey Burdock site, there is no relevant information or supporting data for the Dewey Burdock site in Attachment 34.

The Board has previously explained that petitioners bear the burden under such an argument, as there is a strong presumption that an Agency has not improperly excluded documents from the administrative record. *In re GE*, 18 E.A.D. 575, 609 (EAB 2022). "The standard for establishing bad faith or bias in decisionmaking is very high. Anyone alleging such behavior must 'overcom[e] the presumption of honesty and integrity attaching to the actions of

government decisionmakers.'" *In re Town of Newmarket*, 16 E.A.D. 182, 243 (EAB 2013) (citations omitted). Petitioners' alleged evidence of omission, Attachment 34, was not related to the Dewey Burdock permits and did not offer any evidence of "bad faith or bias in decisionmaking" in connection with the Dewey Burdock permits that would overcome the presumption in favor of completeness of the administrative record. Therefore, Petitioners have not met this very high burden, and the Board should deny review of this issue.

The Petitioners inaccurately link this argument to their concern that they did not have an opportunity to comment on the underlying information the Region relied on with regard to the AE boundary and zone of influence discussions. Petition at 14-15. To the contrary, the Region fully explained its AOR determination in the Class III fact sheet, and its AE boundary determination in the AE Record of Decision, and the Petitioners had the opportunity to comment on these issues in both the 2017 and 2019 comment periods. *See e.g.* Attachment F, Doc 171, Bates p. 014689; Attachment G, Doc 174 Bates pp. 014889, 014917; Attachment H, Doc 264; Attachment I, Doc 265.

No commenters, including the Petitioners, raised issues regarding the appropriateness of the area of review or the aquifer exemption boundary during the public comment periods. Petitioners' arguments about the AOR/AE boundary discussion document (Attachment J, Doc 644, Bates p. 082488-082492) indicates that they are concerned about *how* the Region would determine the appropriate AOR and the appropriate AE boundary. But when presented with the opportunity to comment on how the Region determined the actual site-specific AOR and AE boundary associated with the Dewey Burdock permits in 2017 and 2019, they raised no concerns.

Petitioners provide a list of citations (Petition at 15), presumably to demonstrate where they commented on the appropriateness of EPA's delineation of the AOR or the AE boundary. However, the cited materials do not include any comments about the appropriateness of the AOR or the AE boundary. The material raises concerns about geologic and man-made features *within* the AOR, but there are no comments raising any issues around the appropriateness of size or boundary of the AOR determined by the Region in accordance with 40 C.F.R. § 146.6. Nor do any of the comments raise concerns about the appropriateness of the AE boundary determined by the Region in accordance with 40 C.F.R. §§ 144.7 and 146.4. The determinations about the AOR and AE boundaries are separate and distinct from concerns about review of features *within* an AOR and should not be conflated. Finally, Petitioners' reference to the comments about "inadequate area of potential effect (APE)" is about the area of potential effect under the NHPA and is unrelated to the AOR or AE boundary under the Safe Drinking Water Act and the UIC regulations.

Petitioners have not offered any evidence to demonstrate that the Region improperly omitted documents from the administrative record and have not met the high bar of demonstrating bad faith or bias in decision-making. Petitioners have also not demonstrated that the public has not had the opportunity to comment on underlying information the Region relied on in making its AOR or AE boundary determinations, and their request "to remand to the agency for additional investigation or explanation" should be denied.

C. NHPA

1. NHPA issues are not properly before the Board. They are not within the scope of the Board's remand order or EPA's action on remand, and the law of the case doctrine bars relitigation of these settled questions.

In prior proceedings before the Board, the Tribe and EPA have extensively briefed and argued claims regarding the Region's compliance with the NHPA. The Board considered these

issues in several orders, and denied review of all NHPA claims. Most recently, the Board disposed of the last remaining NHPA claim (an alleged violation of section 110 of the statute) and limited any further review to the specific non-NHPA issues remanded to the Region for further decision making: "appeal shall be limited to the issues considered on remand and any modifications made to the permits as a result of the remand." *See Powertech*, 19 E.A.D. at 31-37, 46 n.23. Because neither the Board's remand order nor the Region's action on remand included NHPA section 106 issues, the Petitioners' attempt to revive them is contrary to the Board's order. That alone warrants denial of review as to all NHPA arguments raised in the Petition.

Relatedly, the Board should deny review of Petitioners' NHPA section 106 claim because the Board already decided that issue, making it the law of the case. That is, even if the Order had not expressly limited the scope of the remand and any further petitions, the law of the case doctrine, which "prevents relitigation of settled rulings," should bar the Petition's NHPA claims. *In re J.V. Peters & Co.*, 7 E.A.D. 77, 93 (E.A.B. 1997). In the federal courts, "[i]f there is an appeal from the judgment entered after remand, the decision of the first appeal establishes the law of the case to be followed on the second appeal." 18 Moore's Federal Practice – Civil § 134.22 (2025) ("Moore's"). And the Board has stated that "[t]he doctrine applies with equal force in administrative agency adjudications." *J.V. Peters & Co.*, 7 E.A.D. at 93; *see In re Lyon County Landfill*, 10 E.A.D. 416, 428 (E.A.B. 2002) ("Our Remand Order establishes the law of the case in successive stages of the same litigation. Accordingly, we will not address the same issue again here.").

Here, the Board found that the Region acted in accordance with applicable regulations in designating the Nuclear Regulatory Commission ("NRC") as the lead federal agency for NHPA section 106 compliance, and that the D.C. Circuit upheld the NRC's compliance with the NHPA.

Nov. 2023 Order at 23-24 (citing *Oglala Sioux Tribe v. U.S. Nuclear Regulatory Comm'n*, 45 F.4th 291, 306 (D.C. Cir. 2022)); *see also Powertech*, 19 E.A.D. at 25 n.1 (incorporating by reference the November 2023 Order). "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." Nov. 2023 Order at 24. Further, the Board found that because the Tribe had a "full and fair opportunity" to litigate the NRC's compliance with NHPA section 106 in the D.C. Circuit, "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." *Id.* at 28-29. For those reasons, the Board denied review on the Tribe's section 106 claim. *Id.* at 29. Accordingly, it is the law of this case that the Region has complied with section 106 of the NHPA in issuing the permits. On that basis, the Board should deny review.

Petitioners may argue that the law of the case does not apply in light of the "new circumstances" that they have sought to present concerning the status of the project license issued by NRC, the Programmatic Agreement, and NRC administrative proceedings in connection with the renewal of the project license. *See* Petition at 19-25. But Petitioners mischaracterize the nature and effect of these circumstances, which do not rise to the level of significance needed to justify disregarding the law of the case. Under the law of the case, a court "should not" revisit its prior decisions "absent *extraordinary* circumstances showing that the prior decision was *clearly wrong and would work a manifest injustice*." Moore's § 134.21 (emphasis added). As further explained below, Petitioners have not identified any such circumstances.

Petitioners' NHPA arguments would reopen and relitigate challenges that the Board has already firmly rejected. The Board did not remand these issues for further consideration by the Region, and allowing the Petitioners to reopen the settled issue of EPA's compliance with the NHPA would not only be contrary to the Board's directions in the Order and the law of the case; it would undermine the "efficiency, predictability, and finality of the permitting process." *In re BP Cherry Point*, 12 E.A.D. 209, 220 (EAB 2005).

2. In seeking to reopen the Region's permitting decision beyond the scope of the Board's remand, Petitioners are without justification introducing material outside the administrative record.

The Board's previous decision in this matter, which resolved and denied review of all NHPA questions, contained narrow instructions to the Region for further action with respect to the administrative record on remand. In directing the Region to reissue the permits after addressing those narrow instructions, the Board did not reopen any questions related to NHPA compliance. Nor did the Region's review of records in response to the remand introduce any concerns as to the sufficiency of its NHPA compliance. But Petitioners now bring NHPA arguments based on documents and developments postdating the Region's original permitting decision and not included as part of the updated record on remand. Petitioners thus impermissibly seek to expand the scope of review, supplement the administrative record without justification, and effectively reopen and restart the permitting process.

Petitioners' request for the Board to revisit its conclusion that the Region complied with the NHPA appears based on their assumption that reissuance of permits is a new undertaking, requiring entirely separate compliance with section 106. Petition at 23. It is not. "Undertaking" under the section 106 regulations refers to "*a project, activity, or program* funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those

requiring a Federal permit, license or approval." 36 C.F.R. § 800.16(y) (emphasis added). The "undertaking" here is the Dewey-Burdock *project*, and the EPA activity that is relevant to the undertaking and this proceeding is the issuance of the UIC permits. The Board has already concluded that EPA properly designated NRC as a lead federal agency to act on the Region's behalf, and that NRC's compliance with NHPA section 106 has been "conclusively" determined. Nov. 2023 Order at 24. Nothing more is needed to effectuate EPA's compliance with Section 106. Any attempt by Petitioners to reopen that issue would exceed the scope of the Board's December 2024 final decision and remand. Relatedly and by necessity, it would also require consideration of extra-record material, in a full reopening of the issues on which the Board has previously denied review.

3. Petitioners incorrectly assert that the Region's reissuance of permits after the remand requires new section 106 compliance.

Petitioners broadly assert that "[s]ection 106 requirements … apply to permits, such as those here, issued after a remand," and that "whether original or reissued permits, as part of ongoing federal actions, these undertakings require Section 106 compliance." Petition at 24. But the principal authority they cite, *Vieux Carre Prop. Owners, Residents & Assocs., Inc. v. Brown*, 948 F.2d 1436, 1445 (5th Cir. 1991), is inapposite. True, there is a superficial procedural similarity: the Fifth Circuit was considering a renewed challenge to a federal permitting action, following a remand to the agency after a previous appellate decision. But in *Vieux Carre*, unlike this case, the court had made *no previous finding of NHPA compliance*. *See id.* at 1449 (stating that in initial permitting action, agency "decided that it was not required to undertake the historic review consultation procedures mandated by Congress in Section 106"). Whether NHPA compliance was required in the first instance was a live issue in *Vieux Carre*, as reflected in the remand from the previous appellate decision:

> [W]e … remanded the case to the district court with instructions to make specific legal and factual findings, including (1) whether the park project required an individual permit or was within the § 330.5(a)(3) nationwide permit, and, (2) assuming the nationwide permit was found by the district court to be appropriate, whether the permit was valid and the park project triggered NHPA.

Id. at 1440. Accordingly, when the *Vieux Carre* court stated that "NHPA review is required and the park project remains a federal undertaking," it was referring to an undertaking as to which no NHPA compliance had occurred or been evaluated by a court. On this essential point, the present case is entirely distinct; the Board has already held that NHPA compliance was completed, as to the same federal undertaking.

Petitioners also quote the statement in *Morris County Trust for Historic Preservation v. Pierce*, 714 F.2d 271, 281 (3d Cir. 1983) that the NHPA applies to "ongoing Federal actions as long as a Federal agency has opportunity to exercise authority at any stage of an undertaking where alterations might be made to modify its impact on historic preservation goals." Petition at 24. But like *Vieux Carre,* this was a case where no NHPA compliance had previously occurred: "HUD did not at any time take into account the effect of the Dover Renewal Plan on the Stone Academy, or afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the project." *Morris County Trust*, 714 F.2d at 279. Here, on the other hand, NHPA compliance has been determined. And the "alteration" that Petitioners request of the Region is to "require competent cultural resource surveys." Petition at 24. That would entail setting aside the lead agency designation and the Board's holdings concerning NHPA compliance, and would require the Region to commence separate efforts to identify historic properties through surveys, despite the holding of the D.C. Circuit that no further survey efforts were required. *See Oglala Sioux Tribe*, 45 F.4th at 306 ("agency may … satisfy its NHPA obligations without conducting a survey or conducting it in a specific way"; denying review). In *Morris County Trust*, the Third

Circuit cited its "well-established tradition of refusing to place upon Federal agencies meaningless and otherwise unreasonable procedural burdens." 714 F.2d at 281. Restarting the NHPA compliance process would impose just such a burden here.

Petitioners acknowledge that the Board denied review as to their NHPA section 106 claims, but assert that "new circumstances demonstrate that the previous finding the [sic] NRC's compliance with the NHPA is no longer supported," and therefore that the Region's permitting decisions violate the NHPA. Petition at 17-19. To make this argument, though, Petitioners reach beyond the administrative record[6] – and the Board's review is based on the administrative record. *See In re GE*, 18 E.A.D at 608 (stating that in permit appeals, "our review is generally limited to [the] … certified administrative record" submitted by the Region, and that the Board is "reluctant to consider materials that were not actually before the decisionmaker at the time of the decision that is under review"); *In re Energy Answers Arecibo, LLC*, 16 E.A.D. 294, 334 (E.A.B. 2014) ("As a general matter the Board will not consider extra record materials (i.e., data and other information that were not considered by the Agency as part of the permitting decision).").

The Board has recognized only "three narrow circumstances" under which it may, in its discretion, consider material not in the certified administrative record:

> (1) to allow a petitioner to question the validity of material added to the administrative record in response to public comment, (2) to take official notice of relevant information that is publicly available and incontrovertible, and (3) to supplement the administrative record with material either that (a) is required to be included under the regulations, or (b) the Agency relied on in its permitting decision.

[6] All of Petitioners' NHPA arguments are based on extra-record information except for their statement that "there is no lawful basis for the agency to rely on a Programmatic Agreement (PA) to satisfy its NHPA Section 106 responsibilities." As explained below, that argument was not preserved for appeal. And (like all of Petitioners' NHPA arguments), it is beyond the scope of the Board's direction on remand and barred by the law of the case applicable to this action.

In re GE, 18 E.A.D at 609. None of those narrow exceptions applies here. Moreover, Petitioners have the burden of demonstrating that the Board should consider extra-record material. *See id.* (stating that "the petitioner bears the burden of overcoming the strong presumption that the Agency did not improperly exclude documents from the administrative record."); *id.* at 617 (finding that the petitioners did not carry their "burden of supporting their claim that we may take official notice of the extra-record [document]"). And although Petitioners have sought to supplement the record in other parts of the Petition, as addressed above in section 2.d, as to NHPA issues they have not attempted to supplement the record or otherwise justify reliance on extra-record and post-decisional documents. Instead, Petitioners have simply referred to extra-record documents as if they were part of the record for this matter. This attempt to introduce extra-record information and reopen NHPA compliance issues fails to satisfy the narrow criteria for expanding the administrative record.

4. One of Petitioners' NHPA arguments is also not properly before the Board because Petitioners did not preserve it for appeal.

As explained above, Petitioners' NHPA arguments entirely fail on threshold procedural bases. One of these arguments suffers from the additional infirmity that it was not preserved for appeal, because the Petitioners did not raise it "with reasonable specificity" during the comment period. *In re Indeck-Elwood*, 13 E.A.D. at 143. This argument is that "there is no lawful basis for the agency to rely on a Programmatic Agreement (PA) to satisfy its NHPA Section 106 responsibilities," and that the Region failed to demonstrate that the Dewey-Burdock Project fit within any of the categories at 36 C.F.R. § 800.14(b)(1) for which an NHPA programmatic agreement is appropriate. Petition at 25. Petitioners could have made this argument during the comment period, because EPA had explained that it was considering relying on the NRC as the lead agency for section 106 compliance and signing the Programmatic Agreement negotiated by

NRC and the other section 106 consulting parties. *See* Attachment D, Doc 001, Bates pp. 000309-000312. But nowhere, in either the 2017 or 2019 public comments, did the Tribe or any other party argue that the nature of the Dewey-Burdock Project is incompatible with the use of a programmatic agreement under any of the categories at 36 C.F.R. 800.14(b)(1). Nor did the Tribe make this argument in its previous Petition challenging these permits, although it could have done so. To the contrary, the "no lawful basis" argument, and the idea that EPA was obligated to make a demonstration related to it, is newly raised in this Petition, without any underlying basis in the comments. It was therefore not preserved for review.

5. Even setting aside the multiple procedural defects, Petitioners do not meet their burden of demonstrating error on NHPA grounds.

Even if NHPA issues were properly before the Board, and even if Petitioners' arguments were based on the administrative record, these arguments would fail on their merits. In particular, Petitioners assert that the NRC is no longer in compliance with the NHPA, and that as a result the Region is not either, because it designated the NRC as the lead agency for NHPA section 106 compliance. But the reasons that Petitioners offer as purported demonstrations of NRC's lack of compliance do not withstand scrutiny.[7] Accordingly, Petitioners have not carried their burden to demonstrate that the Region erred.

a. The NRC license remains in effect.

First, Petitioners assert that "the NRC license for the proposed Dewey-Burdock project, upon which the NHPA compliance was based, has expired." Petition at 19. That statement is incorrect, and therefore Petitioners cannot use it to argue that NRC has failed to comply with the NHPA. Powertech has applied for renewal of the license and has received NRC's confirmation

[7] Because Petitioners' arguments are based on extra-record information, the Region must refer to extra-record information in response.

that "the application … is in timely renewal and the existing license *will not be deemed to have expired* until the application has been finally determined in accordance with 10 CFR 2.109." Attachment K, Acknowledgment of Receipt of License Renewal Application, NRC (May 1, 2024) (emphasis added).[8] As the Ninth Circuit has explained:

> NRC regulations addressing license renewals include what is colloquially referred to as the "timely renewal rule." *See* 10 C.F.R. § 2.109. Under the APA, which applies to NRC actions taken pursuant to the Atomic Energy Act, *see* 42 U.S.C. § 2231, "[w]hen a licensee has made timely and sufficient application for a renewal … a license with reference to an activity of a continuing nature *does not expire* until the application has been finally determined by the agency." 5 U.S.C. § 558(c). This provision protects federal license holders … "from harm associated with delays in agency action on requests for license renewals."

San Luis Obispo Mothers for Peace v. NRC, 100 F.4th 1039, 1045 (9th Cir. 2024) (emphasis added; citation omitted). Accordingly, as a matter of law the project's NRC license remains in effect, and Petitioners' assertions to the contrary misconstrue applicable NRC procedures and regulations.

b. Petitioners mischaracterize the status of NRC's administrative decision making.

In addition to their incorrect assertion as to the NRC license, Petitioners assert that the NHPA Programmatic Agreement has expired and that "NRC Staff has conceded that it is no longer in compliance with the NHPA." Petition at 19. They do not cite or quote the purported concession, however, and the Region is aware of no authority or NRC statement (whether in the administrative record or elsewhere) that NRC is out of compliance with NHPA in connection with the Dewey-Burdock license. The closest Petitioners come to identifying a source for their

[8] Letter available at https://www.nrc.gov/docs/ML2412/ML24122B122.pdf. In relevant part, the cited regulation provides:

> … [I]f at least 30 days before the expiration of an existing license authorizing any activity of a continuing nature, the licensee files an application for a renewal or for a new license for the activity so authorized, the existing license will not be deemed to have expired until the application has been finally determined.

assertion is a reference to an administrative filing stating that "NRC must consult before the issuance of the subject renewed license" and that "NRC is not required to consult with the Tribe at this stage of its review but will do so in accordance with its processes for complying with NEPA and the NHPA." Petition at 22 (quoting NRC Staff Consolidated Answer to Intervention Petition of Susan Henderson and Intervention Petition of the Oglala Sioux Tribe, Black Hills Clean Water Alliance, and NDN Collective (Nov. 4, 2024), attached to Petition as Attachment 39). Rather than conceding noncompliance, these anodyne statements explain NRC's process for continuing its compliance with the NHPA in connection with the Dewey-Burdock project's application for license renewal.[9] Accordingly, Petitioners have not identified any basis for the board to revisit its holding that the NRC's compliance with the NHPA in connection with the Dewey-Burdock project has been "conclusively" determined. Nov. 2023 Order at 24.

c. The protective elements of the Programmatic Agreement remain in force.

Petitioners generally assert that the expiration of the Programmatic Agreement is a "new circumstance" demonstrating that NRC is no longer in compliance with the NHPA. Petition at 19-20. But as with the NRC license, the Petitioners ignore an important aspect of the document, one ensuring that protection of historic properties continues. Specifically, the Programmatic Agreement anticipates that it may expire until replaced with a new agreement, and provides that if that happens its protective requirements for historic properties remain intact:

> After the termination of this PA and until the NRC completes consultation and a new PA is executed or the NRC has requested, taken into account, and responded to the comments of the ACHP under 36 CFR § 800.7(c)(4), Powertech is required

[9] To the extent Petitioners are arguing that the Region's designation of NRC as the lead agency for section 106 compliance expired with the Programmatic Agreement, that is incorrect. The Region made this designation by letter; the designation has not expired and is not dependent on the Programmatic Agreement. *See* Attachment L, Doc 664.

> to follow the terms and conditions of this PA for current ground-disturbing activities and is not permitted to begin any such activities in new areas.

Attachment M, Doc 671, 16(c), Bates p. 086588. Thus, the agreement ensures that its protective mandates for historic properties remain in place with respect to any "ground-disturbing activities" that could conceivably harm them. Further, the NRC license – still in force, as explained above – specifically incorporates this provision, and also states that if the PA is terminated, Powertech must nonetheless follow its conditions "for on-going ground-disturbing activities, and is not permitted to begin ground-disturbing activities in unevaluated areas." *See* Attachment N, Doc 084, 9.8, Bates p. 010011. The license even provides that a cultural resource inventory must be conducted in connection with "any developmental activity" not previously assessed by the NRC. *Id.* at Bates p. 010010.

Accordingly, Petitioners' efforts to block the permits on NHPA grounds fail not only for procedural reasons, but substantively. The "noncompliance" assertions crumble under scrutiny, with the licensing documents ensuring that protections for historic properties remain in place. Petitioners have not met their burden to demonstrate that the Board should consider extra-record information or revisit its previous holding; nor have they met their burden to demonstrate that the Region committed any error in connection with the NHPA. Therefore, even if the Board were to revisit the fully resolved question of the EPA's compliance with NHPA section 106, it should reach the same conclusion it reached before and deny review of this issue.

D. Standing

Petitioners have not established standing for the NDN Collective. In the Petition, they allege that "[m]embers and staff of NDN Collective participated in the October 5, 2019 public hearing on the draft permits held by EPA in Hot Springs, SD and cite generally to the transcript at Doc 659. However, no one that provided comments in the hearing identified themselves as

agents or representatives of the NDN Collective. In fact, there is no mention of the NDN Collective in the transcript. Additionally, EPA did not receive any written comments from the NDN Collective. As set out in the Standard of Review above, 40 C.F.R. § 124.19 grants standing only to persons who filed comments or participated in a public hearing. The regulations define "person" as "an individual, association, partnership, corporation, municipality, State, Federal, or Tribal agency, or an agency or employee thereof." 40 C.F.R. § 124.2. As the Petition makes no mention of any specific individuals or members of the NDN Collective at the public hearing, there is no way to verify participation of its members in the hearing. Even if the Petitioners had identified specific members that submitted comments, Petitioners should be precluded from later claiming they participated on behalf of the NDN Collective when they did not identify themselves as such at the time they submitted comment.

The Region does not challenge the standing of the other parties.

CONCLUSION

The Petitioners have failed to meet the standard of review under 40 C.F.R. § 124.19 for the SDWA, administrative law, and NHPA claims, and the Board should deny review. Importantly, Petitioners did not demonstrate that the permit decisions were based on a clearly erroneous finding of fact or conclusion of law. Some of their arguments are outside the scope of the remand and issues preserved for appeal; and several failed to meet a minimum level of specificity. For arguments raised in the comment period, Petitioners neglect to confront the Region's responses to comments and explain why they were clearly erroneous or otherwise warrant review. Therefore, review of Petitioners' claims should be denied on procedural grounds, or alternatively, on substantive grounds for the reasons set forth herein, and the Board should deny review.

STATEMENT OPPOSING ORAL ARGUMENT

The Region opposes additional oral argument in this case. The Tribe had the opportunity to present arguments before the Board in March 2024. Following the Board's partial remand, the Region complied with the Board's remand order and corrected defects in the administrative record, but review of the documents added to the record did not lead to changes in the permits. Contrary to Petitioners' assertion that the issues are complex, the remaining issues should be decided solely on the briefs because Petitioners have not met their burden of demonstrating that review is warranted.

STATEMENT OF COMPLIANCE WITH WORD LIMITATION

In accordance with 40 C.F.R. § 124.19(d)(3), the undersigned attorneys certify that this Response to Petition for Review (exclusive of the table of contents, table of authorities, table of attachments, statement concerning oral argument, statement of compliance with word limitation, and attachments) does not exceed 14,000 words.

Respectfully submitted,

MICHAEL BOYDSTON
Digitally signed by MICHAEL BOYDSTON
Date: 2025.05.09 15:05:40 -06'00'

Michael Boydston
Office of Regional Counsel
EPA Region 8 (8RC-LCG)
1595 Wynkoop
Denver CO 80202
(303) 312-7103
boydston.michael@epa.gov

Lucita Chin
Office of Regional Counsel
EPA Region 8 (8RC-LCM)
1595 Wynkoop
Denver CO 80202
(303) 312-7832
chin.lucita@epa.gov

Erin Perkins
Office of Regional Counsel
EPA Region 8 (8RC-LCM)
1595 Wynkoop
Denver, CO 80202
(303) 312-6922
perkins.erin@epa.gov

Of Counsel:
Katie Spidalieri
EPA Office of General Counsel

CERTIFICATE OF SERVICE

I certify that the foregoing EPA REGION 8'S RESPONSE TO PETITION FOR REVIEW in the matter of Powertech (USA) Inc., Appeal No. UIC 25-01, was filed electronically with the Environmental Appeals Board's E-filing System and served by email on the following persons on May 9, 2025.

Attorneys for Petitioners Oglala Sioux Tribe, Black Hills Clean Water Alliance, NDN Collective

Jeffrey C. Parsons, Senior Attorney
Roger Flynn, Managing Attorney
Western Mining Action Project
P.O. Box 349
Lyons, CO 80540
(303) 823-5738
jeff@wmaplaw.org

Travis E. Stills, Managing Attorney
Energy & Conservation Law
227 E. 14th St., #201
Durango CO 81301
(970) 375-9231
stills@eclawoffice.org

Attorneys for Powertech (USA) Inc.

Jason A. Hill
Holland & Knight LLP
811 Main Street, Suite 2500
Houston, TX 77002
(713) 244-8224
jason.hill@hklaw.com

Robert F. Van Voorhees
1155 F Street NW, Suite 700
Washington, DC 20004-1357
(202) 365-3277
robert.vanvoorhees@bclplaw.com

MICHAEL BOYDSTON Digitally signed by MICHAEL BOYDSTON Date: 2025.05.09 15:04:58 -06'00'

Michael Boydston
Office of Regional Counsel
EPA Region 8 (8RC-LCG)
1595 Wynkoop
Denver CO 80202
(303) 312-7103
boydston.michael@epa.gov