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

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

POWERTECH'S RESPONSE IN OPPOSITION TO PETITIONER'S MOTION TO AMEND PETITION

Permittee, Powertech (USA) Inc. ("Powertech") hereby responds in opposition to Petitioner's Motion to Amend its Petition for Review ("Pet.'s Mot." or "Motion"), Docket Index #37.

On December 24, 2020, Petitioner filed its Petition for Review challenging the U.S. Environmental Protection Agency's ("EPA's") issuance of Underground Injection Control ("UIC") permits for the Dewey-Burdock Project issued on November 24, 2020. Docket Index #1 ("Pet. for Review"). Proceedings on this appeal have been delayed for over two years to allow the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") to consider, and ultimately rule against, Petitioner's claims challenging the Nuclear Regulatory Commission's ("NRC") licensing decision for the Dewey-Burdock Project.

Now, instead of moving forward with briefing the merits of its appeal, Petitioner seeks further delay by improperly introducing new, post-decisional information. This material also post-dates the regulatory deadline for filing of any appeal to the EPA UIC permit decision for the Dewey-Burdock Project. Specifically, Petitioner seeks to introduce: (1) material related to a post-

decisional NRC cultural resources survey protocol from September 2021; (2) a post-decisional local ordinance passed in November 2022; and (3) post-decisional reports dated December 23, 2020, May 10, 2021, and August 10, 2021. None of these extra-record materials relate to the question before the Environmental Appeals Board ("EAB" or "Board")—whether EPA's November 24, 2020 decision to issue the UIC permits for the Dewey-Burdock Project is based on a fact or conclusion of law that is clearly erroneous or an important policy consideration that warrants the Board's review. 40 C.F.R. § 124.19(a)(4)(i). Because this extra-record information is not properly before the Board, the Board should deny Petitioner's request to supplement its Petition and move forward with adjudicating the merits of this appeal based upon the actual administrative record for the challenged decision.

I. Standard for Amending or Supplementing a Petition for Review

The general practice of the Board is to prohibit petitioners from raising new issues after the 30-day deadline for filing petitions. This general practice is well-founded. No ambiguity exists in the regulations: "[a] petition for review ***must*** be filed with the Clerk of the [] Board within 30 days after the Regional Administrator serves notice of the issuance of a [UIC] final permit decision under § 124.15." *Id.* § 124.19(a)(3) (emphasis added). Allowing new claims after this deadline would impermissibly expand a party's appeal rights.

Accordingly, the regulations do not include any specific provision on amending or supplementing petitions for review. But the Board has considered certain factors underlying such motions. These factors include, but may not be limited to: (1) prejudice against the permittee; (2) a general interest in timely, efficient, fair, and impartial adjudication and permit resolution; and (3) whether the amendment would raise substantive questions outside the Board's jurisdiction.

The Board denies requests to amend or supplement a petition when doing so "would constitute an unwarranted expansion of a party's appeal rights and would prejudice the permittee's interest in a timely resolution of the permitting process." *In re Zion Energy, L.L.C.*, 9 E.A.D. 701 (EAB 2001) (denying a request to supplement because it "would prejudice the permittee's interest in a timely resolution of the permitting process").

The Board has granted limited leave to supplement only when doing so would "promote the efficient, fair, and impartial adjudication." Order Denying Motion for Reconsideration and Granting Petitioner Leave to Supplement Petition for Review, with Limitations at 6, *In re City & Cty. of San Francisco*, NPDES Appeal No. 20-01 (EAB June 18, 2020) ("*City & Cty. of San Francisco* Order") (where EPA made a post-decision change in its characterization of a permit).

The Board has "den[ied a] request to file an amended petition, as the issues they would advance would present jurisdictional problems" by raising issues that fall outside the Board's jurisdiction and must, therefore, be pursued in another forum. *In re Indeck-Elwood, LLC*, 13 E.A.D. 126, 211 (EAB 2006).

In deciding whether to allow Petitioner to supplement its petition with arguments based upon post-decisional material, the Board should be guided by its principles for supplementing the administrative record. *See In re Gen. Elec. Co*., 18 E.A.D. 575, 614–15 (EAB 2022).

II. Argument: The Tribe's Motion to Amend its Petition Should Be Denied

1. Powertech Would Be Further Prejudiced by Allowing Petitioner To Supplement its Petition for Review.

Petitioner improperly asserts that the Board's *Indeck-Elwood* decision stands for the proposition "that the Board has regularly granted [requests for amending or supplementing a Petition for Review] where there [is] no discernible prejudice to the permittee because the amended or supplemental petition was filed before any responsive pleadings." Pet.'s Mot. at 2

(citing *Indeck-Elwood*, 13 E.A.D. at 139 n.36). Petitioner implies that, if no responsive pleadings have been filed, then there is no prejudice.[1] However, this misapprehends the cited footnote from that decision, which clearly reiterates the Board's "general practice of only entertaining issues raised during the 30-day filing deadline for filing petitions." *Indeck-Elwood*, 13 E.A.D. at 139 n.36.

Here, allowing Petitioner to amend its Petition almost 850 days after the deadline for filing such a petition with the Board "would not only constitute an unwarranted expansion of [Petitioner's] appeal rights under the applicable regulations, but would result in significant prejudice to [Powertech's] interest in a timely resolution of the permitting process." *Zion Energy*, 9 E.A.D. at 707 (refusing to allow a petitioner to amend a mere two months after the filing deadline and one month after the filing of motions to dismiss). The Board has no justification for doing either here.

Moreover, the Board allowed "deviation" from its general practice in *Indeck-Elwood* only because three specific conditions were all met. Specifically, "[1] there was no discernible prejudice to the permittee, [2] the amended petition was filed before any responsive pleadings, ***and*** [3] the issue raised involved important policy considerations." *Indeck-Elwood*, 13 E.A.D. at 139 n.36 (emphasis added). Petitioner again incorrectly implies that the *Indeck-Elwood* decision allows for amendment of a petition, this time simply because a party asserts that it raises "important policy considerations." However, the "important policy consideration" concept is rooted in the regulations, which provide that a petitioner "must demonstrate that each challenge

[1] Even if this were the law, which it is not, such a proposition would not assist Petitioner in this case because Powertech has filed a responsive pleading seeking to dismiss Petitioner's National Environmental Policy Act ("NEPA") claims. *See* Powertech Motion to Strike [NEPA] Challenges (May 18, 2021), Docket Index #16 ("Powertech Mot. to Strike").

to the permit decision is based on: [among other things] . . . an important policy consideration that the . . . Board should, in its discretion, review." 40 C.F.R. § 124.19(a)(4)(i)(B). In *Indeck-Elwood* the Board exercised its discretion to determine that the petition presented "important policy considerations." That is not the case here.

Powertech's interest in having a timely resolution of the permitting process is already prejudiced. There has been a lengthy delay of more than two years awaiting the D.C. Circuit's ruling against Petitioner's challenge to the NRC license. In addressing Petitioner's claims under the National Historic Preservation Act ("NHPA") and NEPA the D.C. Circuit detailed numerous NRC attempts to address Petitioner's concerns over a ten year period and how Petitioner's repeated refusals to participate and "intransigence made its cultural resource information, in effect, unavailable." *Oglala Sioux Tribe v. U.S. Nuclear Regulatory Comm'n*, 45 F.4th 291, 297–98 (D.C. Cir. 2022). The D.C. Circuit found NRC's efforts under NEPA reasonable and that NRC had satisfied its NHPA obligations, and ultimately upheld its licensing decision. That decision was issued on August 9, 2022, but these proceedings were further delayed pending Petitioner's unsuccessful attempt at rehearing. Further delay also followed to allow Petitioner's full time to seek certiorari to run. Petitioner now seeks additional delay by asking to supplement its Petition for Review with extraneous material, all of which post-dates the decision at issue. Further delay would only further prejudice Powertech's interest in timely resolution of the appeal process. The Board should prevent further prejudice to Powertech by denying Petitioner's Motion.

2. *The Board's Commitment to Timely, Efficient, and Fair Adjudication Necessitates Denying Petitioner's Motion to Amend.*

In considering Petitioner's request, the Board should also consider the timeliness, efficiency, and fairness of adjudicating the permits. *City & Cty. of San Francisco* Order. In *City*

& County of San Francisco, the Region made inconsistent characterizations about the permit at issue, at times characterizing it as two permits (state and federal) and at times just one permit. There, the permittee requested leave to amend the petition to address the Region's "two permit" theory. In deviating from its general practice, the Board limited the supplementation of the petition for review to allow only "new issues or arguments pertaining to any potential consequences allegedly arising from the Region's post-petition characterization of the Oceanside Permit as two permits." *Id.* at 6.

City & County of San Francisco presented a unique factual situation that is not present in the current case. Here, Petitioner's new claims do not relate to any post-decisional actions by EPA. In fact, the new claims do not even relate to EPA's November 24, 2020 decision on the UIC permits for the Dewey-Burdock Project. Moreover, they come after a delay of more than two years to allow for Petitioner's unsuccessful challenge of the NRC licensing decision before the D.C. Circuit, including "the overlapping issues" the Board relied upon in granting a stay to allow the challenge to that decision to fully conclude before moving forward in this appeal challenging the UIC permits. *See* Order Granting Motion to Stay Subject to Conditions at 4 (June 10, 2021), Docket Index #23. In granting the stay request, the Board did so "mindful of Powertech's interest in securing its permits and proceeding with its Dewey-Burdock Project" and reiterated its commitment "to adjudicating the claims before it in an expeditious and fair manner." *Id*.

The same factors of expeditious and fair adjudication now necessitate denying Petitioner's request for further delay. Allowing Petitioner to include extra-record, post-decisional material not relevant to the decision at issue in this appeal will only lead to inefficiency by

obfuscating the issues at hand and unfairly allow Petitioner an unwarranted expansion of its appeal rights. Based on these factors, the Board should deny Petitioner's request.

3. The New Issues Petitioner Seeks To Introduce Do Not Warrant Consideration.

While allowing limited supplementation in *City & County of San Francisco*, the Board also cautioned that "[a]ll standards pertaining to issues or arguments raised in petitions for review continue to apply." *City & Cty. of San Francisco* Order at 6 (citing 40 C.F.R. § 124.19(a)(4)). This means Petitioner must rely on the administrative record at the time of decision. 40 C.F.R. §§ 124.9, 124.18, & 124.19(a)(4)(ii).[2]

The Board has established only two instances for allowing parties to supplement the administrative record: (1) material that must be included in the administrative record, 40 C.F.R. § 124.18(b)(1)–(7) or (2) material the agency relied upon, but failed to include in the administrative record. *See In re Gen. Elec. Co*., 18 E.A.D. 575, 614–15 (EAB 2022). The post-decisional materials presented here satisfy neither. *Id*. The Board has provided two reasons, based upon the very nature of post-decisional information, why this is so:

> *First*, it cannot be required administrative record material under the regulations because the regulations specify that the record closes when the permit is issued, 40 C.F.R. § 124.18(c). *Second*, the Agency cannot possibly have relied upon post-decisional material in its permitting decision because such material would have come to the Agency's attention after the permitting decision was already made.

[2] Presumably, the requirement for petitions to not exceed 14,000 words also applies. 40 C.F.R. § 124.19(d)(3). The Petition, excluding attachments, was approximately 13,813 words in length according to its statement of compliance with word limitation. *See* Pet. for Review. Petitioner now seeks to supplement its Petition with an additional 7 pages. *See* Supplemental Petition for Review (Apr. 21, 2023), Docket Index #38 ("Pet.'s Suppl. Pet."). Prior to exceeding the word limit found in the regulations, a party must seek advance leave of the Board, and such requests are explicitly discouraged and should be granted only in "unusual circumstances," where a party can demonstrate a compelling and documented need. 40 C.F.R. § 124.19(d)(3). Otherwise, the Board may exclude any petition that does not meet the word limitation. *Id*.

Id. at 610. For these reasons, the Board has been "very reluctant to consider post-decisional documents" and rejected adopting a liberal approach to allowing post-decisional material as "'reflect[ing] a flawed understanding of the basic principles of administrative record review.'" *Id*. (citation omitted).

Allowing Petitioner to supplement its petition with such post-decisional material would run afoul of these same principles. *See In re Gen. Motors Corp*., 5 E.A.D. 400, 405 (EAB 1994) (stating that supplementation of data provided after permit issuance "would be to invite unlimited attempts by permittees to reopen and supplement the administrative record after the period for submission of comments has expired").

The administrative record for the challenged decision in this appeal was complete on November 24, 2020—the date of permit issuance. 40 C.F.R. § 124.18(c). All of the new arguments Petitioner seeks to raise now rely entirely on post-decisional material dated December 23, 2020, May 10, 2021, August 10, 2021, September 2021, and November 2022. Based upon the Board's well-grounded record review principles, none of this material would be allowed into the administrative record. Accordingly, it should not form any basis for allowing Petitioner to amend its Petition. Petitioner's attempt to make these arguments and draw a corollary to the Federal Rules of Civil Procedure "reflect[s] a flawed understanding of the basic principles of administrative record review and the limited instances in which an administrative record may be supplemented on appeal." *In re Town of Newmarket, NH*, 16 E.A.D. 182, 241 (E.A.B. 2013). Allowing Petitioner to amend its Petition with materials that it could not introduce into the administrative record would circumvent well-established record review principles. Therefore, the Board should deny Petitioner's Motion.

4. The Board Lacks Jurisdiction Over the Challenges Sought Through Amendment of the Petition.

Petitioner would amend its Petition to include arguments that ask the Board to consider material completely outside its jurisdiction. First, Petitioner seeks to have the Board consider a post-decisional cultural resources survey protocol developed by NRC for a different project involving a different licensee in a different state. Second, Petitioner asks the Board to consider and interpret a local county ordinance. Third, the Petitioner wants the Board to review attachments to unspecified "Securities filings" related to potential projects that Powertech may apply for in the future. The Board should not allow Petitioner to amend its Petition to add arguments outside the Board's jurisdiction or that would raise issues that present jurisdictional problems. *Indeck-Elwood, LLC*, 13 E.A.D. at 211–12. Challenges to the actions of other agencies that fall outside the Board's jurisdiction would instead need to be pursued in the appropriate forum. Similarly, challenges to future UIC permitting decisions would need to be brought before the Board only after a final decision has been made by EPA. *Id*.

5. Response on Cultural Resources Survey Protocol

Petitioner asserts that an "important policy consideration exists as to whether and to what extent EPA Region 8 is obligated, prior to permit issuance, to comply with [NHPA] requirements aimed at protecting the significant cultural resources of the Oglala Sioux Tribe and Lakota people generally." Pet.'s Mot. at 3. In support, Petitioner asks the Board to consider a post-decisional cultural resources survey protocol developed by NRC in September 2021 for the Crow Butte Resources Inc. facility in Dawes County, Nebraska—a completely separate project of a different licensee in a different state—to demonstrate that information related to cultural resources for the Dewey-Burdock Project was not "unavailable" to Region 8 when it adopted NRC analysis in making the November 24, 2020 decision.

The Board should deny Petitioner's request to amend its Petition to include the cultural resources survey for several reasons. First, the fact that NRC later developed a cultural survey protocol for the Crow Butte Resources Inc. facility in Dawes County, Nebraska after additional meetings with Petitioner in 2021 does not inform Petitioner's challenge to EPA's decision at the time of permit issuance in 2020 whereby EPA relied on the NRC's NHPA section 106 review and consultation in issuing the UIC permits for the Dewey-Burdock Project. Nor does it change the facts that this jointly developed cultural survey protocol was not available when EPA issued the UIC permits in November 2020, nor that the Tribe continued to pursue its appeal against NRC for the licenses relevant to this project after the protocol was developed in that other project. Second, the D.C. Circuit has already ruled in NRC's favor regarding this project and upheld the determination that NRC satisfied its NEPA and NHPA obligations. *Oglala Sioux Tribe v. NRC*, 45 F.4th at 301. Third, if the cultural resources survey methodology that can be used in identifying cultural resources in the future,[3] then it would be pointless for this Board to order any further remedy, even if this unrelated post-decisional information were considered. (If anything, this prompts the question of why the Tribe continued its challenge to the NRC licensing decision in the D.C. Circuit and continues to maintain this appeal before the Board as it

[3] EPA and Powertech signed the Programmatic Agreement ("PA"), which provides for identification of cultural resources on the project site and would allow for implementation of the cultural resources methodology as appropriate. *See* EPA, Response to Comments ("RTC") at 311, Attachment 35 to Pet. for Review, Docket Index #1 (citing PA Stipulations 3 and 9) ("Appendix B of the PA includes information on archaeological and tribal field surveys, and describes cultural resources identified within and adjacent to the boundary of the 10,580-acre project site. More than 300 cultural resources were identified based on this evaluation. Under the PA, Powertech is also required to protect all unevaluated properties until a determination is made as to their eligibility for inclusion on the National Register of Historic Places, and additional investigations are required if changes in the project design could affect any unevaluated properties. The PA also includes provisions for halting ground-disturbing work and evaluating any previously unknown cultural resources discovered during implementation of the project.") (internal citations omitted).

pertains to the NHPA issue.) Fourth, the challenged UIC permits ultimately protect any cultural resources, since all ground-disturbing activities within 150 feet of any area of discovery of previously unknown cultural resources must halt or minimize impacts until the property is evaluated for listing on the National Register of Historic Places by qualified personnel, among other protections. Class III Injection Well Area Permit Dewey-Burdock Uranium In-Situ Recovery Project Custer and Fall River Counties, South Dakota, Part XIV(A)(4) (Area Permit No. SD31231-00000, Nov. 24, 2020); Class V Deep Injection Well Area Permit Dewey-Burdock Uranium In-Situ Recovery Project Custer and Fall River Counties, South Dakota, Part IX(A)(4) (Area Permit No. SD52173-00000, Nov. 24, 2020).

NRC's post-decisional 2021 cultural resource survey protocols for the Crow Butte Resources Inc. facility in Dawes County, Nebraska ultimately provide no basis for Petitioner to supplement its Petition challenging the 2020 EPA's UIC permit decisions for the Dewey-Burdock Project.

6. Response on Fall River County Ordinance

Petitioner asserts an "important policy consideration" exists as to whether EPA Region 8 may issue a final and effective permit for an activity that is unlawful under local laws. This challenge is not properly before the Board because its consideration is precluded by the very regulatory provision that Petitioner cites as justification for raising it. Rather than properly interpreting 40 C.F.R. § 144.35(c) as written and intended, Petitioner stands the provision on its head and seeks to infuse it with an opposite meaning. That provision states very simply and directly that the UIC permits issued to Powertech have no bearing whatsoever on compliance with state and local laws. As the Board noted in *In re Beckman Production Services*, 5 E.A.D. 10

(EAB 1994) the regulations governing UIC permits could not be more clear on this issue. Issuance of a UIC permit

> "does not convey any property rights of any sort, or any exclusive privilege," nor does the issuance of a . . . permit "authorize any injury to persons or property or invasion of other private rights, *or any infringement of state or local law or regulations*." 40 C.F.R. § 144.35(b) & (c) (emphasis added [in *Beckman*]). This means that even if a . . . permittee has met all federal requirements for issuance of a UIC permit, it is not by virtue of its federal UIC permit shielded from compliance with any valid state or local regulations governing its operations.

Id. at 23.

Moreover, here, as was true there, "[t]he permits each expressly provide in Part I[] that:"

> Issuance of this Permit does not convey property rights of any sort or any exclusive privilege; nor does it authorize any injury to persons or property, any invasion of other private rights, or any infringement of State or local laws or regulations.

In re Envotech, L.P., 6 E.A.D. 260, 275 n.20 (EAB 1996). Indeed, the Board rejected permit provisions that would require compliance with state and local requirements. *In re Puna Geothermal Venture*, 9 E.A.D. 243, 270 (EAB 2000). Local requirements of this type likely cannot negate a federal permit and are likely preempted by federal and state authority over underground injection and uranium mining. *See e.g., Vanguard Env't, LLC v. Terrebonne Parish Consol. Gov't*, No. 2012 CA 1998, 2013 WL 4426508, at *6 (La. Ct. App. June 11, 2013) (finding "express terms of our pertinent statutory law and the regulations adopted pursuant thereto [for injection wells] are pervasive and clearly manifest a legislative intention to preempt the field in its entirety") (*citing Desormeaux Enters., Inc. v. Vill. of Mermentau*, 568 So. 2d 213, 215 (La. Ct. App. 1990)).

In sum, "EPA is simply not the correct forum for litigating [such] disputes that may happen to arise in the context of waste disposal activity for which a federal permit is required. These disputes properly belong in a court of competent jurisdiction." *In re Suckla Farms, Inc.*,

4 E.A.D. 686, 695 (EAB 1993). Accordingly, Petitioner's motion to supplement its petition must be denied with respect to this challenge regarding the Fall River County Ordinance.

7. Response on Project Design Assertions

Petitioner asserts that a significant question is presented by the changes in the project design and scope that have occurred between EPA Region 8's permitting decisions and the Board's review. Specifically, Petitioner asserts: "EPA Region 8's analyses and permitting decisions do not match the applicant's current plans, mandating that EPA Region 8 update its analysis, particularly its assessment of cumulative impacts." Pet.'s Suppl. Pet. at 2. Yet Petitioner acknowledges that the matters described in the "three regulatory reports" cited amount to nothing more than "proposals" for future expansions of operations. *Id.* Tellingly, the preliminary economic assessment ("PEA") report itself repeatedly cautions: "there is no certainty that the preliminary economic assessment will be realized." NI 43-101 Technical Report, Preliminary Economic Assessment, Dewey-Burdock Uranium ISR Project, South Dakota, USA at 4, 9, 10, 84 n.1, 96, 120, 132 n.1, 137 (Report Date Dec. 23, 2020), Attachment 38 to Pet.'s Suppl. Pet., Docket Index #38 ("2020 Dewey-Burdock Technical Report").

The 2021 technical report cited by Petitioner involves an estimate "to evaluate in situ recovery ("ISR") potential of resources" owned by Powertech's parent and located in Fremont and Natrona Counties, Wyoming. NI 43-101 Technical Report, Mineral Resource Report, Gas Hills Uranium Project, Fremont and Natrona Counties, Wyoming, USA at 1 (Report Date May 10, 2021), Attachment 39 to Pet.'s Suppl. Pet., Docket Index #38. The report transparently recognizes that all of the necessary underground injection wells necessary to achieve the estimated result would be located in Wyoming and would require the issuance of new permits. Based on the estimate, "the Author would recommend that Azarga consider initiating

Environmental Permitting of the Project." *Id.* at 3. Specifically, the report recognizes the need for future permitting:

> URZ has a Drilling Notification ("DN") approved by the WDEQ/LQD and the US BLM that allows surface use for the purposes of exploration by drilling.
>
> Although not required at this stage, mine development would require a number of permits depending on the type and extent of development, the most significant permits being the Permit to Mine and the Source Materials License issued by the WDEQ/LQD as required for mineral processing of natural uranium. Any injection or pumping operations for in situ mining operations will require permits from the WDEQ which has authority under the Safe Water Drinking Act that stems from a grant of primacy from the US Environmental Protection Agency for administering underground injection control programs in Wyoming.

Id. at 11–12. Thus, the additional permitting would not be before Region 8 because Wyoming has primacy to issue permits for that potential future ISR project.

Even the preliminary economic analysis for the Dewey-Burdock Project covered by the permits at issue here recognizes that realization of the projections "may require license/permit amendments where these resources extend beyond the current permit boundary." Dewey-Burdock Technical Report at 5. Likewise, the project timelines have built in "Permit Amendment Approval" periods. *Id.* at 8 and 88; *see also id.* at 14 & 137 (recognizing the need for "Additional Permit / License amendments and approvals necessary to realize all resources included in this PEA"). Thus, these arguments were certainly discernable and should have been raised during the comment period and included in the initial Petition filed within the 30-day filing deadlines. They were not. Such a defect is fatal to Petitioner's attempts to raise them now, over two years after a final decision on the permits has been made. *See Rohm & Haas*, 9 E.A.D. 499 EAB (2000) (denying a motion to supplement because the issue of whether interim measures can be imposed without a permit modification was ascertainable during the comment period but was raised for the first time in the motion to amend).

Nor does Petitioner's reference to "cumulative impacts assessment," Pet.'s Mot. at 2, justify amendment of the Petition where, as here, any additional wells not already considered by EPA would be outside the current permit area or in other projects in different states, requiring new permit amendment or issuance proceedings. 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. 33,290, 33,333 (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 33,334.

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. 45 Fed. Reg. at 33,439. On August 27, 1981, EPA published "technical amendments as part of a settlement agreement reached with petitioners who [had] challenged the regulations in court." 46 Fed. Reg. 43,156, 43,156 (Aug. 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.

Id. at 43,157. 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.*

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. 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." Attachment 1 to Powertech Mot. to Strike, EPA, Cumulative Effects Analysis at 1. 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, "EPA clarifie[d] that these summaries were provided for informational purposes only and that additional analysis on these topics are not required under 40 CFR Section 144.33(c)(3)." *Id*. EPA reiterated that "EPA's discussion of cumulative effects . . . does not include activities further in time or too far away from the project site." RTC at 317.

In sum, Petitioner's assertion that "EPA Region 8's analyses and permitting decisions do not match the applicant's *current* plans," Pet.'s Suppl. Pet. at 2 (emphasis added), is

demonstrably false and provides no justification for adding challenges to the Petition through amendment. Petitioner even acknowledges that "Permit/license amendments will be required" for the expanded operations projected in the PEAs. *Id.* at 5. Expansions covered by the PEA estimates would require additional applications and approvals of permits or permit amendments by EPA and other agencies and therefore have no bearing on the permits at issue here.

III. Conclusion

For all of the foregoing reasons, the Board should deny Petitioner's Motion to Amend Petition.

Statement of Compliance with Word Limitations

In accordance with 40 C.F.R. § 124.19(f)(5), the undersigned attorneys certify that this Response to Motion of Petitioner to Amend Petition contains approximately 5426 words.

Respectfully submitted,

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Dated: May 8, 2023

CERTIFICATE OF SERVICE

I hereby certify that, on May 8, 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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