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

In re:	)
Powertech (USA) Inc.	)
Dewey-Burdock Uranium In-Situ	)
Recovery Project,	)
Class III Area Permit No.	)
SD31231-00000; AND	)
Class V Area Permit No.	)
SD52173-00000	)

REPLY TO REGION 8 AND POWERTECH RESPONSES
TO PETITION FOR REVIEW

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SUMMARY

Pursuant to 40 C.F.R. § 124.19(c)(2), the Oglala Sioux Tribe ("Tribe" or "Petitioner") hereby files this consolidated Reply to EPA Region 8's Response to Petition for Review ("Region Response") and the Response of Powertech (USA) Inc. to Petition for Review ("Powertech Response"). The Responses fail to rebut the Tribe's demonstration in the Tribe's Petition for Review ("Petition") that the Region's permitting analysis was based on clearly erroneous findings of fact and conclusions of law in: (1) failing to demonstrate compliance with the requirements of the National Historic Preservation Act ("NHPA") Section 110; 2) failing to demonstrate compliance with the cumulative effects analysis required by 40 C.F.R. § 144.33(c)(3), the "functional equivalence" doctrine, and the National Environmental Policy Act's ("NEPA's") "systematic, interdisciplinary approach" to federal decisionmaking; 3) failing to demonstrate compliance with the Safe Drinking Water Act and implementing regulations, including 40 C.F.R. § 144.12, 40 C.F.R. § 146.33(a), and 40 C.F.R. § 146.6(a)(ii), regarding demonstration of ability to contain the mining fluid within the exempted aquifer and protect underground sources of drinking water; and 4) failing to abide by the procedural rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. §§ 701, *et seq*.[1]

[1] Neither the Region nor Powertech challenge the Tribe's demonstration regarding the threshold standing requirements for filing a petition for review under 40 C.F.R. part 124. *See* Petition at 10-11.

For consistency and clarity, this Reply cites to Responses by pdf-assigned page number instead of the internal page number. The internal page and pdf numbering are the same in the Tribe's filings.

ARGUMENT

A. EPA Region 8's Decisions Violate the National Historic Preservation Act Section 110.

In its November 16, 2023 Order, the Board denied review of the Tribe's claims regarding National Historic Preservation Act (NHPA) Section 106, but held open the Tribe's claim under NHPA Section 110.[2] The Region argues that NHPA Section 110 has no independent force, and adds nothing beyond compliance with NHPA Section 106. Region Response at 18 (citing *Oglala Sioux Tribe v. U.S. Army Corps of Eng'rs*, 537 F.Supp.2d 161 (D.C.C. 2008) (quoting *Nat'l Trust for Historic Pres. v. Blanck*, 938 F.Supp. 908, 925 (D.D.C. 1996). The Region thus argues that because the Board has denied review on Section 106, any arguments related to Section 110 should be similarly disposed of in summary fashion. Region Response at 18.

However, the Region committed clear error by failing to recognize that Section 110 created new procedural requirements for the protection of historic and cultural resources. *Recent Past Pres. Network v. Latschar*, No. CIV.A.06-2077 TFH AK, 2009 WL 6325768, at *7 (D.D.C. Mar. 23, 2009) ("the Court agrees with Plaintiffs that, as described in *Blanck*, Section 110 creates procedural requirements that are separate and distinct from Section 106…."), report and recommendation adopted in part, rejected in part on other grounds, 701 F. Supp. 2d 49 (D.D.C. 2010). As the *Oglala Sioux Tribe* Court ruled, citing *Blanck*, Section 110 "requires an agency 'to comply to the fullest extent possible with, and in the spirit of, the Section 106 consultation process and with its own Historic Preservation Plan.' 938 F.Supp. at 925". *Oglala Sioux Tribe v. U.S. Army Corps of Engineers*, 537 F. Supp. 2d at 173. The Region possesses no specialized

[2] Section 110 was recodified in 2014 at 54 U.S.C. § 36101 -306107 and 306109–306112.

knowledge that could overcome the judiciary's statutory interpretation of NHPA's plain language and structure that gives meaning to both Section 106 and 110, and renders neither superfluous. *Nat'l Parks Conservation Ass'n v. Semonite*, 916 F.3d 1075, 1088 (2019) (even if an ambiguity existed, the Park Service and Advisory Council are responsible for administering NHPA).

Here, the Region ignores the Tribe's thorough argument detailing the failure of the agency to fulfill its NHPA obligations "to the fullest extent possible*."* The failure to meet EPA's Section 110 duties is demonstrated by the Region's short-sighted carte blanche adoption of the Nuclear Regulatory Commission (NRC) staff's NHPA process, which was limited to NHPA duties involving NRC control and authority. Indeed, the NRC's Atomic Safety and Licensing Board (ASLB), ruled only after seven years of attempts that NRC Staff had finally demonstrated compliance with its NHPA Section 106 consultation duties, but could show only that it had satisfied, "at a bare minimum, the NHPA's requirement that the NRC Staff consult with the Oglala Sioux Tribe." *In the Matter of Powertech USA, Inc.*, 86 N.R.C. 167, 172 (2017) (LBP-17-9). "A bare minimum" is a far cry from the NHPA Section 110 requirement that the Region comply with its NHPA requirements "to the fullest extent possible." *Oglala Sioux Tribe v. U.S. Army Corps of Engineers*, 537 F. Supp. 2d at 173. Notably, the ASLB (and by extension the NRC and the D.C. Circuit Court of Appeals) had no occasion to review compliance with Section 110, as that provision was not at issue in either of those proceedings. In any case, the Region's Section 110 duties could not be properly raised in the limited NRC licensing proceedings, and were properly raised in this SDWA proceeding. Petition at 22.

The Region argues that this issue was not sufficiently raised in the public comments or in the Petition. Region Response at 16-18. However, there is no dispute that the Tribe's public

comments and Petition squarely raised the issue of noncompliance with Section 110. Region Response at 17 (admitting the Tribe asserted that "NHPA Section 110 imposes responsibilities [that] cannot be dispensed with simply through attempts to contact the Tribe in the Section 106 consultation context."). No further elaboration was needed to alert the Region of its duty, and failure, to address Section 110 duties. *See Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 899 (9th Cir. 2002) (holding that comments need only describe "procedures sufficiently for the agency to review these procedures and to conclude" whether the agency had complied). Indeed, the Region effectively recognizes that the Tribe adequately raised this issue by arguing that Section 110 compliance is co-extensive with Section 106 compliance, but then wholly ignores Tribe's in-depth discussion of the Region's failure to comply with the NHPA. Region Response at 18-19. The Tribe has adequately raised and articulated the basis for the Region's failure to meet its Section 110 obligation to fulfill its NHPA duties.

Specifically, the Tribe points to the undisputed fact that there has *never* been a competent Lakota cultural resources survey conducted on the Dewey-Burdock site. Petition at 16-17. The Region fails to address this inexcusable fact in any respect. The Region further fails to attempt a rebuttal of the Tribe's argument that the lack of a competent survey fatally undermines the Programmatic Agreement (PA) upon which the Region so fundamentally relies. Petition at 21-22. The lack of a cultural resources survey is an inexcusable and incontrovertible present fact that was established by the ASLB as early as 2015. *In The Matter of Powertech (USA), Inc.* (Dewey-Burdock ISR Project), LBP-15-16, 81 N.R.C. 618, 655 (2015) ("the Board finds and concludes that the FSEIS has not adequately addressed the environmental effects of the Dewey-Burdock project on Native American cultural, religious, and historic resources") (affirmed 84 N.R.C. 219 (2016)), s*ee also Oglala Sioux Tribe v. NRC,* 896 F.3d 520, 526 (D.C. Cir. 2018)

(confirming that the NRC adjudication "left in place the findings that the Staff had failed to comply with NEPA and the National Historic Preservation Act.").

Despite the differing scope of NRC licensing and EPA's SDWA permitting authorities, the Region identifies nothing in the record that demonstrates the Region met its duties pursuant to NHPA Section 110. Instead, the Region crafts a series of technical arguments that seek to excuse this procedural omission, which was duly identified in the Tribe's comments. *See* Attachment A, Document 00868, Bates 090692 (Tribe's comments). Moreover, this Board should give meaning to EPA's longstanding commitment to Environmental Justice and Tribal Sovereignty by rejecting the Region's deliberate and unlawful reliance on an incompetent cultural resources survey to dismiss Section 110 duties, resulting uninformed decisionmaking, and failure to provide the Tribe a meaningful opportunity to identify, evaluate, or mitigate impacts to its cultural resources.

B. EPA Region 8's Decisions Violate the Functional Equivalence Standard for National Environmental Policy Act (NEPA) Compliance.

The Region and Powertech argue that it need not comply with NEPA based on their view of the "functional equivalence" doctrine. Region Response at 19-23; Powertech Response at 13-16. However, the Region and Powertech misapprehend both the Tribe's arguments and the "functional equivalence" doctrine itself. The Tribe does *not* argue that the Region was required to take the formal procedural step of preparing an Environmental Impact Statement (EIS) in issuing the challenged UIC permits. Rather, the Tribe argues that the Region's permitting process failed to achieve "functional equivalence" to NEPA's duties in this case because the Region neglected its obligations to review, consider, and allow public comment on, among other things, available groundwater and hydrogeological data, alternative courses of action, mitigation

measures, and significant direct, indirect, and cumulative environmental impacts resulting from the Region's permitting decisions. Petition at 23-33.

The Region cites to caselaw, including from the U.S. Court of Appeals for the 8th Circuit in *Western Nebraska Res. Council v. U.S. EPA*, 943 F.2d 867 (8th Cir. 1991) and this Board in *In re Am. Soda, LLP*, 9 E.A.D. 280, 290-292 (EAB 2000) that stand only for the proposition that the Region need not go through the procedural step of preparing a formal EIS document. Region Response at 20-21; Region Attachment C (Memorandum to Dewey-Burdock UIC File). *See also* Powertech Response at 13-16. However, as detailed at length in the Petition, excusing the Region from the formal procedural step of preparing an EIS under the "functional equivalence" doctrine does *not* exempt the Region from providing the "full and adequate consideration of environmental issues" as statutorily required by NEPA. Petition at 24-25 quoting *Warren County v. North Carolina*, 528 F. Supp. 276, 286 (E.D. N.C. 1981). The Region erroneously fails to recognize that an EIS is but "[o]ne of NEPA's 'action-forcing' procedures." *Gov't of Manitoba v. Zinke*, 849 F.3d 1111, 1115 (D.C. Cir. 2017). By misconstruing the functional equivalence doctrine as a wholesale NEPA exemption, the Region fails to assert compliance with NEPA's action-forcing provisions that extend beyond comment opportunities, including to give full and adequate consideration to environmental issues. *See* 42 U.S.C. § 4332 (setting forth NEPA duties applicable to all agencies).

The Region attempts to persuade this Board that the Tribe failed to adequately raise this issue in the Petition simply because the Petition did not cite all of the Region's cited caselaw. Region Response at 20. The Region ignores the extensive discussion in the Petition of the "functional equivalence" doctrine and its application to this matter, which also demonstrates that the Region's case law is inapposite and irrelevant to application of the functional equivalence

doctrine here. Petition at 23-25, 32. The Region cites no precedent that requires a petitioner to cite irrelevant caselaw in an otherwise comprehensive argument on an issue simply because the Region chooses to rely on that caselaw. Similar efforts to escalate the commenting requirements in an effort to avoid scrutiny of the agency's duty to comply with NEPA procedures have been rejected in the federal courts. *See Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 899 (9th Cir. 2002).

Powertech goes further, arguing that no NEPA issues can come before this Board. Powertech Response at 14-16. This is incorrect. EPA is subject to NEPA compliance unless statutorily exempted, which the functional equivalence doctrine cannot achieve. As confirmed by the analysis of a non-new NPDES permit, this Board is properly presented with a justiciable question of whether a permit analysis meets the tests used by the "functional equivalence" doctrine to address NEPA duties. *See In Re: Phelps Dodge Corporation, Verde Valley Ranch Development*, 10 E.A.D. 460 (May 21, 2002).

The Region grossly overstates the limited doctrine at issue, contending that pursuant to its regulations and this Board's decisions, "EPA's actions in issuing the UIC permits and aquifer exemption for the Dewey Burdock project to Powertech under the SDWA are exempt from NEPA. . . ." Region Attachment C at 5 (Bates 23426). This is clear error. Implementation of the court and agency-created "functional equivalence" exemption from the formal step of preparation of an EIS is one thing, but the Region's permitting actions were based on an erroneous expansion of the doctrine to exempt SDWA permitting from the Congressionally-imposed statutory mandates of NEPA. Thus, the question in this matter is not, as the Region attempts to argue, so simple as whether a formal EIS was required (it was not). Rather, the question for the Board is whether the analysis provided by the Region in its permitting decision

was truly the "functional equivalent" of NEPA's hard look mandate such that the analysis provided the "full and adequate consideration of environmental issues" as statutorily-required by the legislative command that "all agencies of the Federal Government" "shall [comply with NEPA] to the fullest extent possible." 42 U.S.C. § 4332. *See also In Re: Phelps Dodge Corporation, Verde Valley Ranch Development*, 10 E.A.D. 460 (May 21, 2002) (confirming the applicability of NEPA and this Board's jurisdiction to review compliance with the "functional equivalence" requirement).

The Region's erroneous disavowal of its NEPA duties is coupled with a failure to demonstrate NEPA compliance. As extensively detailed in the Petition, the Region's analysis was not the "functional equivalent" of NEPA. Petition at 25-33. Specifically, the Petition details the Region's failure to properly account for the direct effects, the indirect effects, and cumulative impacts (*see* 40 C.F.R. §§1502.16; 1508.8; 1508.25(c)) resulting from the Region's permitting decision, including to cultural resources (Petition at 26, 32) (citing EPA Response to Comments ## 263, 297), air quality (Petition at 26-27, 32), groundwater (Petition at 25, 35-45), wildlife (Petition at 33), and impacts associated with transport and disposal of radioactive waste (Petition at 27-28)(citing EPA Response to Comments ## 283, 330, 331). In addition, the Region completely disregarded any evaluation of Powertech's extensively documented and foreseeable plans to expand the Dewey-Burdock processing site to encompass and accommodate specific satellite mines. *See* Petition at 29-30. As set out below, the Region also relied on preliminary data, instead of all available data, and disavowed any NEPA or SDWA duty to inform the public or the Tribe of groundwater and hydrogeological matters. Region Response at 36 ("The public does not need the site-specific data to comment on whether the permit's conditions are adequate to protect USDWs."), Powertech Response at 23 (asserting "there is no requirement for the

applicant to submit this information to obtain a permit or for the Region to submit that information to public comment.").

Significantly, neither the Region nor Powertech provide the Board with any substantive rebuttal with respect to any of the Tribe's specific, record-supported arguments as to the agency's failure to fully and adequately review impacts, relying instead principally on the clearly erroneous position that NEPA duties do not apply to the Region's decision-making in this matter or is somehow beyond the jurisdiction of the Board to review. Where the Region does mention the areas of flawed analysis raised by the Tribe, it does so only with a generalized reference to the Cumulative Effects Analysis and other vast portions of the record, including entire state and NRC documents, but failing to point to any specific portion of those documents or address the specific arguments raised by the Tribe. Region Response at 24-27. The Region's broad-brush arguments do not provide the level of specificity necessary for the Tribe or this Board to meaningfully assess the Region's assertions of NEPA compliance.

As part of the attempt to evade any NEPA applicability, both Responses contend that the cumulative effects analysis requirement in the SDWA regulations is completely divorced from any NEPA requirements to review direct effects, indirect effects, or cumulative impacts. Region Response at 25; Powertech Response at 16-19. However, as discussed, NEPA applies in this matter – the question is whether the Region's analysis met the "functional equivalence" test that is applied when the Region does not use the formal tool of an EIS to meet its NEPA duties. Given the detailed arguments put forth by the Tribe and the tepid rebuttals provided by the Region and Powertech, this Board should grant review and remand back to the Region with instructions to complete the required "full and adequate consideration of environmental issues," "to the fullest extent possible," as statutorily-required by NEPA. 42 U.S.C. § 4332.

C. EPA Region 8's Decisions Violate the Safe Drinking Water Act.

Both Responses downplay the SDWA's mandate that "even after an aquifer exemption is approved by EPA, the construction and operation of any underground injection well must be subject to strict controls." *W. Neb. Res. Council v. Envtl. Prot. Agency,* 793 F.2d 194, 196 (8th Cir. 1986) (internal citations omitted). These "strict controls" are established and implemented on a site-specific basis via updated permit regulations that place the burden on the permit applicant to show "that the requirements of this paragraph are met." 40 C.F.R. § 144.12. Incomplete data does not enable the Region to analyze direct or cumulative effects of the injection wells, and prohibits permit issuance. 40 CFR § 144.33(c)(3). It is legal error to issue a permit without first requiring the applicant to meet its burden to show, through site specific data, that the proposed operations overcome SDWA prohibitions on the movement of radioactive and toxic fluids created by injecting mining lixiviants into aquifers containing groundwater that meets drinking water standards. *Id*.

Instead of applying these burdens before issuing the permit, the Region granted a permit while allowing the applicant to delay consideration of available data provided by the applicant or public comments, until after permit issuance. Petition at 36. It is error to rely on post-permit data gathering to avoid the applicants' burdens to show eligibility for a SDWA permit. 40 C.F.R. § 144.12.

The Responses provide various legal excuses for ignoring the burden placed on the applicant seeking a UIC permit. The Responses instead rely on a series of legal theories that subvert the purpose of SDWA prohibitions that require a thorough, site-specific and data-based analysis of the Project Area before deciding whether to permit injection wells that deliberately contaminate groundwater with radioactive and highly mobile lixiviant.

Despite the robust testimony provided by the Tribe's experts, both Responses argue that the Tribe didn't meet its burden, even though the SDWA places the burden on the applicant to make a site-specific showing of the "strict controls" required to gain an injection permit, even when the Region has granted an aquifer exemption. Indeed, the Region turned SDWA-imposed duties on their head by erroneously arguing that the Tribe must meet the heavy burden to provide evidence addressing what the Region should have required the applicant to show in the first instance. Even accepting the Region's legally erroneous burdens, the Tribe has provided evidence confirming the "strict controls" are not established by the incomplete data the Region considered in granting the permit.

1. The Issuance of the Permits based on Inadequate Groundwater Quality Information is Confirmed by the Applicant's Failure to Provide Site-Specific Information Necessary to Model and Assess Baseline Groundwater Quality or to Address the SDWA Prohibitions on Fluid Movement.

The regulations place the evidentiary burden on the applicant seeking an injection permit. 40 C.F.R. § 144.12. Incomplete site-specific data prevented the Region from analyzing the direct and cumulative effects of the movement of fluids caused by the injection wells. *Id*., 40 CFR § 144.33(c)(3). There is no dispute that the Region correctly recognized that:

> "in order for the model to ensure that the injection activity can meet the prohibition of fluid movement in 40 CFR § 144.12 and substitute for physical monitoring, it needs to be populated with site-specific data…."

Petition at 37, quoting EPA Response to Comment #72. There is no dispute that site-specific data needed to reliably model fluid movement in light of the known and unplugged boreholes connecting various acquirers was available, but was not considered or made available for comment "in advance of permitting the project." Powertech Response at 24, Region Response at 28 citing *In re American Soda*, LLP, 9 E.A.D. 280 at 296 (EPA June 30, 2000) (SDWA permitting is based on "the data in the application, the regional data known at the time of the

permit application and the comments submitted to the Region"). The legal errors regarding deferral of agency consideration and public comment on available site site-specific data until after permitting should end the matter.

Instead of defending the data gaps in the Region's permitting analysis, the Region mischaracterizes the Tribe's position as requiring "all water quality sampling must be done." Region Response at 27. Read fairly, the Tribe argues that available data required to assess the "prohibition on fluid movement" must be analyzed before permitting. Petition at 38. By misconstruing the regulatory requirements and misrepresenting the Tribe's comments regarding the recognized need for site-specific data, the Region failed to address the SWDA's statutory prohibitions on fluid movement. The Region thus committed clear error.

Moreover, as stated above, each Response admits a NEPA violations that also confirms the legal error surrounding the lack of site-specific SDWA data. Region Response at 36 ("The public does not need the site-specific data to comment on whether the permit's conditions are adequate to protect USDWs."), Powertech Response at 23 (asserting "there is no requirement for the applicant to submit this information to obtain a permit or for the Region to submit that information to public comment."). The Responses admit the two fundamental flaws that requires permit to be set aside: 1) the Region failed to require the applicant to provide site-specific information; and, 2) the Region refused to provide "site-specific data" for comment, which prohibited meaningful, informed participation by the Tribe and the public.

Neither Response mounts a serious defense as to the lack of direct, indirect, and cumulative impacts analyses based on necessary, available, site-specific data regarding groundwater quality, and the impact of thousands of boreholes in the project area on the strict controls needed to implement the SDWA prohibition on fluid migration, before issuing the

permit. Region Response at 31 (Region's argument that it is not "necessary to have comprehensive site-specific water quality information to be able to assess potential impacts to groundwater"); Powertech Response at 23. Neither seriously contest the Tribe's unchallenged expert testimony and evidence establishing that the Region relied on incomplete site-specific data, and the Region admits clear legal error during permitting by arguing that there is no requirement for the Region to base its permitting decisions on reasonably complete data. *Id*., Petition at 35-38.

2. Inadequate Hydrogeological Analysis is Confirmed by the Region's Reliance on Preliminary Information Despite Expert Testimony Showing that the Region Failed to Analyze *Available* Site-Specific Hydrogeological Data.

The applicant did not provide the Region with site-specific hydrogeologic information necessary to conduct a hydrogeological analysis required to overcome the prohibition of fluid movement standard. 40 C.F.R. § 144.12(a), discussed by Petition at 38-45. The Responses do not dispute the expert testimony establishing the inadequacy of the data and analysis the Region put out for public comment, pointing instead to the Region's responses to comments. Region Response at 32. The Region also erroneously characterizes the SDWA's "strict controls" that prohibit fluid movement as a "general prohibition" that does not require site-specific hydrogeological data to overcome. Region Response at 35-36.

The Region committed clear error by carrying out permitting on the erroneous conclusion of law it relies upon in Response by misconstruing the Tribe's argument as requiring "all" hydrogeological information must be provided and analyzed before permitting. Region Response at 17. By misconstruing the Tribe's argument that the Region did not rely on *available* site-specific data, and by taking an adversarial posture against the Tribe at every turn, the Region forgave the applicant's burden to provide *all available data* needed to assess hydrogeological

conditions before permitting. *In re American Soda*, LLP, 9 E.A.D. 280 at 296 (EPA June 30, 2000). The Region similarly vitiates the ability for the Tribe to provide informed comments by relying on *preliminary* data. *Id*. The Region's Response confirms that the determination on the SDWA's fluid movement prohibition was therefore not a product of technical analysis based on *available* data. The Region's permitting decisions were based on legal posturing that diminished the applicant's pre-permitting burdens, and placed these burdens on the Tribe and the public whose comments identified the lack of obtainable and necessary site-specific data in both the application and the agency request for comments. Petition at 35-45, *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 899 (9th Cir. 2002) (comments need only alert the agencies to problems).

Allowing SDWA prohibitions on fluid movement to be overcome based solely on "preliminary hydrological information" instead of available site-specific data and expert testimony offered during comments is clear error. Region Response at 32-33. This error unlawfully restricted the public's opportunity to provide meaningful comment on the SDWA's fluid movement prohibitions or the strict controls necessary to protect groundwater.

Despite the limited data the Region provided for public comment and ultimately relied on to issue the Permit, the Tribe successfully confirmed that the applicant possessed information regarding boreholes that would overcome geohydrological barriers to migration of the lixiviant. Petition at 44. There is no dispute that 40 C.F.R. § 146.34(a)(2) and (3) specifically require that the Region review this data on historic boreholes "prior to the issuance of a permit" for a new Class III well. The Region illogically contends that it need not consider this information. Region Response at 34. Again, the Region confirms it committed clear error throughout permitting by shifting permitting burdens onto the Tribe to show "permit conditions are

inadequate to prevent endangerment to USDWs from boreholes." *Id*. Shunting the Region's permitting duties onto the Tribe, whose comments included expert testimony showing inadequate hydrogeological information to support a permit decision, is clear error.

3. SDWA Conclusions

The Region committed clear error by failing to require and review site-specific data to determine whether the proposed injection wells could be operated without violating the groundwater protection purposes and prohibitions in the SDWA. The ability to consider additional information after permitting does not eliminate the SDWA requirement that the Region consider available data regarding fluid migration before permit issuance. *In re American Soda, LLP*, 9 E.A.D. 280 at 296 (EPA June 30, 2000). Despite federal trust duties toward Tribes, the Region takes an adversarial stance and joins the applicant in a series of legalistic dodges to avoid compliance with bedrock principles underlying SDWA permitting. The purposes and structure of the SWDA must be interpreted to ensure EPA's resources are spent on rigorous technical analysis ahead of permit issuance instead of on technical legal arguments that delay, and avoid, SWDA analysis. The Region's legal arguments that shift the applicant's burdens onto the Tribe constitute clear error.

D. <u>The Region Violated the Administrative Procedure Act.</u>

As discussed in depth in the Petition, the Region engaged in an improper and unlawful years-long exercise with Powertech and uranium industry experts – to the express exclusion of the Tribe and the public – to define key regulatory terms applicable to the UIC permitting program. Petition at 45-51. The Region and Powertech assert that the discussions complained of were merely standard pre-application technical discussions. Region Response at 40; Powertech Response at 34-35. However, the Region's express refusal to produce or include any of these

relevant discussions and documents in the Administrative Record effectively prevents this Board from conducting a competent review of this permit decision. Region Response at 41.

As discussed in the Petition, where the administrative record is lacking, the proper course is to remand back to the agency. "When the agency record is inadequate, 'the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.'" *Sierra Club-Black Hills Group v. U.S. Forest Service*, 259 F.3d 1281, 1289 (10th Cir. 2011) *quoting Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). Similarly, "if limitations in the administrative record make it impossible to conclude the action was the product of reasoned decisionmaking, the reviewing court may supplement the record or reman the case to the agency for further proceedings." *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575 (10th Cir. 1994). Like the Region's refusal to provide the public with available data to inform public comments, the Region's omission of relevant information from the administrative record required for Board review warrants withdrawal of the permit and remand.

The Region and Powertech argue that their engagement in years-long, covert technical regulatory discussions were not a de-facto rulemaking because they have no precedential effect. Region Response at 40, Powertech Response at 36. First, the legal arguments in the Response are undermined by the incomplete record in this proceeding. Second, as argued by the Tribe, the limited number of available documents show that the Region did utilize this permitting process to develop regulatory definitions that were expressly intended to, and did, create a "binding norm" as to how those critical terms and definitions would be applied in future cases. *See* Petition at 50-51, citing *Pacific Gas and Electric Co. v. Federal Power Commission*, 506 F.2d 33, 38 (D.C.Cir.1974); *American Min. Congress v. Marshall*, 671 F.2d 1251 (10th Cir. 1982).

Given the detailed argument set forth in the Petition, and the failure of the Region to effectively address or defend against its improper de-facto rulemaking, nor even provide this Board with a complete administrative record upon which to fully consider the issues, this Board should accept review of this issue and remand for compliance with the APA, or at minimum for production of a competent administrative record.

CONCLUSION

Given the lack of compliance with the NHPA, NEPA, SDWA, and APA, the Board should accept review in this case and remand the challenged permit back to EPA to fulfill its statutory and regulatory obligations.

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Date: January 22, 2024

STATEMENT OF COMPLIANCE WITH WORD LIMITATION

This petition for review complies with the requirement that replies on petitions for review not exceed 7,000 words.

This Reply is approximately 4977 words in length.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Reply on Petition for Review in the matter of Powertech (USA) Inc., Dewey-Burdock Uranium In-Situ Recovery Project, Permit No.: Class III Area Permit No. SD31231-00000, And Class V Area Permit No. SD52173-00000, was served, by email in accordance with the Environmental Appeals Board's September 21, 2020 Revised Order Authorizing Electronic Service of Documents in Permit and Enforcement Appeals, on the following persons, this 22nd Day of January, 2024:

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