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	)

PETITIONERS' REPLY

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SUMMARY

Pursuant to 40 C.F.R. § 124.19(c)(2), the Oglala Sioux Tribe, Black Hills Clean Water Alliance, and NDN Collective (collectively "Petitioners") hereby file 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 Petitioners' demonstration in the 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"); 2) failing to demonstrate compliance with the cumulative effects analysis required by 40 C.F.R. § 144.33(c)(3); 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 and record review requirements of the Administrative Procedure Act, 5 U.S.C. §§ 701, *et seq*.[1]

In addition, Powertech and the Region make a threshold challenge to the demonstration of standing by NDN Collective, and Powertech (but not the Region) further challenges the standing of Black Hills Clean Water Alliance ("BHCWA"). Powertech Response at 7-11; Region Response at 40-41. These arguments should be rejected, as members and employees of BHCWA and NDN Collective submitted comments and participated in hearings on the Project as required

[1] The Oglala Sioux Tribe will not dignify the spurious, unprofessional, and pejorative allegations that line Powertech's Response, including accusing the Tribe of "deploying frivolous administrative and judicial tactics across numerous forums . . . ." Powertech Response at 1. This Board deserves a higher level of decorum from the counsel that practice before it.

under the applicable regulations, and at minimum, properly raise arguments that were not reasonably ascertainable at the time of the first appeal period in 2020.

ARGUMENT

A. Petitioners Meet All Threshold Requirements.

Powertech argues that neither BHCWA nor NDN Collective are precluded from participating in this administrative process because they did not file an appeal with the Board challenging the original permits that never became effective and that were remanded back to the Region by this Board. Powertech Response at 8-10. Notably, Powertech makes no threshold arguments with respect to the Oglala Sioux Tribe, even though all of the arguments made by all three Petitioners are identical. The Region, at the end of its Response, asserts only that NDN Collective, but not BHCWA, lacks standing. Region Response at 40-41.

In support of its threshold argument, Powertech cites *In re Upper Blackstone Water Pollution Abatement Dist.*, 15 E.A.D. 297, 302 (EAB 2011) and *In re Dominion Energy Brayton Point*, *L.L.C.*, 13 E.A.D. 407, 438 (EAB 2007). However, both cases are distinguishable. In *Upper Blackstone Water Pollution Abatement Dist.*, the parties at issue had not participated in any manner in any administrative proceedings, whether by filing comments, attending public hearings, or otherwise. 15 E.A.D. at 302. Here, there is no dispute that BHCWA repeatedly submitted detailed public comments. *See* Petition at 6 (citing multiple detailed comments filed by BHCWA). Further, contrary to both Powertech's and the Region's arguments, NDN Collective staff attended and commented during public hearings on the draft permits on October 5, 2019. *See* Petition at 6, citing transcript at AR Doc. # 659, pp. 33:10 – 36:2 (public comments of Andrew Catt-Iron Shell, NDN Collective staff); *see also* Affidavit of Andrew Catt-Iron Shell (attached).

In any case, applicable EPA regulations provide that "[a]ny person who failed to file comments or failed to participate in the public hearing on the draft permit may petition for administrative review only to the extent of the changes from the draft to the final permit decision." 40 C.F.R. § 124.19(a). Similarly, the cases cited by Powertech explain:

> the petitioner must demonstrate that any issues and arguments it raises on appeal were preserved for Board review by having been raised during the public comment period, **unless the issues or arguments were not reasonably ascertainable before the close of public comment**. 40 C.F.R. §§ 124.13, .19(a). Where the decision at issue is a final decision issued after remand, as is the case here, the scope of the appeal is further limited to the remanded permit condition(s) and to any changes to the permit required by intervening changes in the law governing the permit.

Upper Blackstone Water Pollution Abatement Dist., 15 E.A.D. at 301-302 (emphasis added) (footnote omitted). Here, the arguments raised by BHCWA and NDN Collective were not reasonable ascertainable, as the facts and law underlying them have changed since the 2020 permit issuance. For example, the Programmatic Agreement has now expired. Further, the applicant has now proposed significant changes to the proposed operation, including increased uranium extraction at the site from locations not previously identified in the original application, as well as the use of the Dewey-Burdock facility as a regional processing center for other 'satellite' uranium for which the company has taken concrete steps to bring into production. These facts distinguish the second case relied upon by Powertech, as the portion cited merely stands for the proposition that "[w]e have previously held that a petitioner may not raise, for the first time, in a second petition, arguments that should have been raised in an original petition." *In Re: Dominion Energy Brayton Point, L.L.C.*, 13 E.A.D. at 438.

In this case, the Region offered no opportunities for any public comment or involvement on remand. Nevertheless, the agency produced a decision that, in part because of the long delay between the original permits and the newly issued permits (over four years), significant changes

in the legal and factual landscape had occurred. These are the bases of BHWCA's and NDC Collective's arguments and could not have been raised in a previous Petition as they were not ascertainable.

Lastly, Powertech argues, without authority, that no arguments except those specifically set forth in the remand order may be raised in a new petition. Powertech Response at 10. EPA Region 8 also asserts that the new Petition exceeds the allowable scope of review. EPA Region 8 Response at 6-7. However, as discussed, these arguments are without merit as Petitioners are allowed to raise any argument that "were not reasonably ascertainable" and based on "any changes to the permit required by intervening changes in the law governing the permit." 15 E.A.D. at 301-302 citing 40 C.F.R. §§ 124.13, .19(a). As discussed throughout the Petition, there have been numerous changes in the facts and the laws governing the permit, including expiration of the Programmatic Agreement relied upon for NHPA compliance, fact-intensive cumulative effects assessment requirements and "separate project" test (*see* Powertech Supp. Authority), and the APA administrative record issues. For these reasons, the Board should reject the Region's and Powertech's attempts to shield the permits issued on remand from effective review by this Board.

B. <u>The Region's Decisions Violate the National Historic Preservation Act.</u>

The Region and Powertech contend that compliance with the NHPA is not required for the issuance of UIC permits on remand. Region Response at 29-40; Powertech Response at 25-35. These arguments largely parrot each other, but neither are not supported by law or the facts which have changed during remand. The Region and Powertech wrongly attempt to justify reliance on an undeniably expired Programmatic Agreement as the basis for the agency's compliance with the NHPA. There is no dispute that the Region's issuance of the permits in this

matter occurred after the Programmatic Agreement, upon which the agency relies entirely for compliance with the NHPA, had expired. As discussed in the Petition, under the unequivocal mandates of the NHPA regulations, the expired Programmatic Agreement cannot be relied upon to satisfy the requirements of the NHPA. *See* Petition at 22.

As such, the Region has committed clear error by relying entirely on a Programmatic Agreement that was at the time of permit issuance. The Region points to provisions of the expired Programmatic Agreement that prohibit the licensee from taking action on the license, but ignores evidence that that NRC Staff improperly delayed surveys and other duties until after licensing. Petition at 20-23 quoting NRC documents. The changed circumstances and legal claims are being addressed by as-yet incomplete NRC Staff consultations that will be reviewed by NRC's Atomic Safety as a potential violation of NHPA's consultation requirements. Simply put, the Region seeks to rely on NHPA compliance by the lead agency, even though NRC – the lead agency – has confirmed that NRC has not completed its NHPA consultation.

Neither the Region nor Powertech meaningfully address the controlling case law and binding Advisory Council on Historic Preservation (ACHP) regulation cited by Petitioners unequivocally prohibiting a federal agency from relying on an expired Programmatic Agreement to satisfy its NHPA obligations. *See* Petition at 22. Indeed, while Powertech quoted (but mis-cited) the appropriate regulation (36 C.F.R. § 800.14(b)(2)(iii), *see* Powertech Response at 28), neither the Region nor Powertech provided any substantive response or discussed the binding case law affirming the dispositive effect of an expired Programmatic Agreement. The irony should not be lost on this Board that both the Region and Powertech argue throughout their Responses that various arguments from various Petitioners should not be considered by the Board for lack of having been previously raised or rebutted, while both Respondents fail to

address controlling legal authority regarding Petitioners' central argument on this aspect – that the Region's violated the NHPA by relying on an expired Programmatic Agreement. In any case, this lack of argument should rightfully be regarded by this Board as a concession by both parties that, because the Programmatic Agreement had expired, NPHA compliance was not achieved. Petition at 22, citing 36 C.F.R. § 800.14(b)(2)(iii); *Narragansett Indian Tribe by & through Narragansett Indian Tribal Historic Pres. Off. v. Pollack*, No. CV 22-2299 (RC), 2023 WL 4824733, at *2 (D.D.C. July 27, 2023).

Instead of addressing the central legal argument, EPA and Powertech instead attempt a raft of ancillary arguments that fail to address the controlling law that forbids reliance on a Programmatic Agreement that has "expired." For example, the Region asserts that "law of the case" demands this Board's willful ignorance of the critical and legally consequential changes in circumstances that render the agency's previous legal and factual positions (and thus the ruling of this Board) inapplicable. Region Response at 29-32; Powertech Response at 25-26 (although referencing, without citation, "administrative finality"). However, the Respondents fail to account for the well-carved exception to any "law of the case" doctrine, which "is tempered by a sound discretion, permitting reexamination in the light of changes in governing law, newly discovered evidence, or the manifest erroneousness of a prior ruling." *In re Multi-Piece Rim Prods. Liab. Litig.*, 653 F.2d 671, 678 (D.C. Cir. 1981). Here the expiration of the Programmatic Agreement qualifies as newly discovered evidence restricting application of any "law of the case" doctrine.

The Region next argues that the Board should not consider the expiration of the Programmatic Agreement because it is somehow outside of the administrative record. Region Response at 35-36. However, the Administrative Record in this case contains the Programmatic

Agreement, which by its express terms states that "[t]his PA shall remain in effect for 10 years from its date of execution (last date of signature), or until completion of the work stipulated, whichever comes first, unless extended by agreement among the signatories." AR 086588 (Doc. 671). Possibly, the Region is referring to the legal briefs attached to the Petition evidencing the NRC's position that the Programmatic Agreement is expired and that the NRC's NHPA duties remain unfulfilled. *See* Petition at 20-22. In that case, however, this Board has long-recognized that it "may take official notice of relevant extra-record material that is 'incontrovertible and publicly available, such as statutes, regulations, judicial proceedings, public records, and Agency documents.' *In re City of Ruidoso Downs*, 17 E.A.D. 697, 716 n.22 (EAB 2019); *see also Russell City*, 15 E.A.D. at 36; 40 C.F.R. § 124.19(n) (the Board may 'do all acts and take all measures necessary for the efficient, fair, and impartial adjudication of issues arising in an appeal')." *In Re: General Electric Co.*, 18 E.A.D. 575, 609-610 (EAB 2022).

Lastly, the Region and Powertech argue that it is not required to comply with the NHPA because its issuance of permits is not an "undertaking" that could trigger the NHPA. Region Response at 32-33; Powertech Response at 28-29, 32-34. This argument cannot be sustained. Binding ACHP regulations define "undertaking" to include any "project . . . requiring a Federal permit, license or approval." 36 C.F.R. § 800.16. *See* Petition at 23-25 (citing cases). While the Region attempts to distinguish the cases cited by Petitioners, it never disputes that the Dewey-Burdock Project "requir[es] a Federal permit" or cites any of its own case law or other authority contravening Petitioners' legal argument that the NHPA applies to the permits issued on remand. Indeed, as argued in the Petition (at 24), the NHPA Section 106 obligations apply as long as the project is "under federal license and the [agency] has the ability to require changes that could conceivably mitigate any adverse impact the project might have on historic preservation goals . .

. .” *Vieux Carre Prop. Owners, Residents & Assocs., Inc. v. Brown*, 948 F.2d 1436, 1445 (5th Cir. 1991). This is certainly the case here.

The Region and Powertech assert, again without relevant authority, that because the NRC licensing process is ongoing and the NRC license has not yet been invalidated or is subject to a ‘timely renewal rule’, the Region’s NHPA compliance somehow remains intact. Region Response at 37-40; Powertech Response at 27. However, nowhere in this argument does the Region or Powertech contradict the expiration of the Programmatic Agreement or the fact that the NRC’s compliance with NHPA, upon with the Region seeks to entirely rely for its own compliance, is unequivocally not yet incomplete and is subject to litigation in the NRC administrative process. *See* Petition at 22-23. The Region and Powertech have successfully argued to this Board that NRC’s final compliance with the NHPA constitutes compliance for the Region – then the opposite is also true: NRC’s lack of final and completed compliance with the NHPA renders the Region’s compliance similarly incomplete. The only reasonable result is to find the Region noncompliant with the NHPA and issue a further remand pending compliance with the NHPA.

C. <u>EPA Region 8’s Decisions Violate the SDWA Requirements.</u>

As to Petitioners’ arguments that EPA Region 8 has failed to demonstrate compliance with the SDWA with respect to inadequate baseline groundwater information and hydrogeological analysis, both EPA Region 8 and Powertech adopt and incorporate the Responses provided previously. Powertech Response at 11; Region Response at 9. Similarly, Petitioners hereby adopt and incorporate the Reply submitted January 22, 2024 at pp. 15-20.

1. Cumulative Effects Analysis Requirement in EPA's Regulations.

As an initial matter, the statutory duties to carry out cumulative effects analysis are imposed on all agencies by NEPA, without exception, and they are expanded and made specific to EPA's groundwater protection programs by the SDWA. Petition at 25 (citing 40 C.F.R. § 144.33(c)(3) and NEPA).[2] The Ninth Circuit has recently clarified "the analytical framework for assessing whether another statute exempts an agency from complying with NEPA's procedural requirements." *Ritidian v. United States Dep't of the Airforce*, 128 F.4th 1089, 1114 (9th Cir. 2025). Region 8 effectively asks the Board to defer without scrutiny to whatever scope of analysis Region decides to implement regarding cumulative effects. However, the adversarial process used to determine whether the Region complied with federal statutes during permitting cannot function under the Region's insistence that the Board simply defer to whatever the Region produces. Compare, Region Response at 1, 18 (urging Board deference instead of careful review) with Order at 8-9 (addressing Board's role in evaluating a permit decision).

Unlike deference the courts owe final agency actions, the Board's administrative review does not apply substantial judicial deference to the Region's licensing decisions. *Seven Cnty. Infrastructure Coal. v. Eagle Cnty*., 221 L. Ed. 2d 820, 831 (2025) ("Courts should afford substantial deference and should not micromanage those agency choices so long as they fall within a broad zone of reasonableness."). Moreover, the U.S. Supreme Court has confirmed that the scope of cumulative effects analysis extends to the whole of the "proposed agency action." *Id*. at 831. Here, there is far more than "mere foreseeability" that Powertech's current proposal, which is documented in sworn regulatory documents (Petition at 26-29) and the Region's own

[2]For purposes of this filing, and in order to preserve appeal rights and judicial review, Petitioners do not concede that Board correctly ruled that the Region's actions are exempt from Board or judicial review for NEPA compliance.

record, extends beyond the portion of the proposal the Region assessed. *Infrastructure Coal. Id*. at 841. The expanded project promoted by Powertech in its publications, established by active delineation drilling, and knowingly ignored by the Region's environmental analyses are not they types of "separate upstream and downstream projects" that can be reasonably excluded from the cumulative effects analysis. *Id* at. 842.

Here, the Region has adopted an unjustified and limited view of the SDWA's cumulative effects duties, which are well short of those imposed by NEPA, and in any case do not relieve the Region of its obligation to review and disclose cumulative effects of the proposed permitting action. In short, this Board should disavow the Region's attempt to limit the cumulative effects analysis to only the subset of drilling and injection wells that Powertech chose to put in front of the Region. Rather, the agency must review the entirety of the reasonable cumulative effects of its permitting action so as to not arbitrarily insulate EPA's permitting actions from being informed by public comments which is a critical aspect of the federal statutory scheme EPA implements in these proceedings. Region Response at 12.

By contrast with the Region's steadfast reliance on the 2020 materials when taking action in 2025 on remand, Petitioners' position is that the Board's careful examination of the record will confirm that the cumulative effects of the Powertech's true current proposal, including the portions unreasonably presented outside of the EPA's permitting, result in an unlawfully segmented the scope of the Region's cumulative effects analysis. Petition at 25-30. Notably, the Region concedes that it has refused to analyze any changes in Powertech's proposal that have been made since the last public comment period closed in December of 2019. Region Response at 5-6 (initial public comments), 17-19 (arguing that documents confirming changes in the Powertech proposal did not warrant public comment during remand).

2. The CEA Fails to Address Cumulative Effects of Powertech's Proposal.

The Region overstates Board's prior ruling finding functional NEPA equivalence by the UIC program by arguing the cumulative effects analysis conducted under the limited scope of the UIC regulations does not overlap with NEPA cumulative effects mandate the UIC regulations purportedly satisfy. Region Response at 11. Indeed, Petitioners' NEPA and SWDA arguments regarding the legal and factual validity of the cumulative effects analysis are necessarily intertwined, as confirmed by caselaw issued subsequent to the Board's order. *Ritidian,* 128 F.4th at 1120 (9th Cir. 2025). The Region's attempt to use the functional equivalence doctrine as a blanket *exemption* that avoids the Board's review of the required interdisciplinary analysis of cumulative effects analysis in the CEA must be rejected. *Kleppe v. Sierra Club*, 427 U.S. 390, 413 (1976) ("Cumulative environmental impacts are, indeed, what require a comprehensive impact statement."); 42 U. S. C. § 4332 (imposing duties on all federal agencies). This argument is disingenuous – stating the UIC has broad environmental scope that covers NEPA effects, then arguing that the UIC excludes environmental concerns and allows a narrow cumulative effects analysis – contradicts both SDWA and NEPA and also confirms the functional equivalence doctrine was misapplied by the Region in narrowing the CEA. *Ritidian*, 128 F.4th at 1120 (9th Cir. 2025).

Areas near the proposed Dewey-Burdock mine are part of the Powertech project that was promoted after 2020, but were not scrutinize in any CEA. There is no dispute that Powertech's proposed project has expanded both within existing area as well as outside the CEA-defined project area. The Region defends its decision to ignore both expansions in the Powertech proposal by arguing that the project modifications Powertech is currently pursuing in a very public manner, while admittedly different than what the Region considered, would be updated if

at some later date if "future information indicates that cumulative effects on the environment are unacceptable." Region Response at 14 citing 40 C.F.R. § 144.39(a)(2). This permit now, analyze later approach compounds the problem by confirming that the Region will only require cumulative effects analysis of impacts that the Region later deems "are unacceptable," and by again admitting the Region fail to address NEPA duties before taking action to approve the Powertech proposal. Neither the SDWA cumulative effects analysis nor NEPA duties can be satisfied by analyses carried out after the agency "completed its decisionmaking." *Ritidian*, 128 F.4th at 1116 (9th Cir. 2025) (analyzing application of functional equivalence doctrine).

The Region's narrow legal approach to the broad cumulative effects mandates of the SDWA and NEPA is legal error that, on the facts of this case, resulted in an erroneously narrow environmental review without public comment on a CEA that has not been updated since 2000. In short, the administrative record cannot support the 2025 agency decisions that did not differ from the decisions issued in 2020.

3. The Inadequate Analysis During Remand is within the Scope of the Petition.

The Region made a strategic litigation decision to forego any new cumulative effects analysis on remand, resting entirely on the CEA and permit decisions. Instead of reopening or reevaluating any aspect of the now-stale CEA and permits, the Region admittedly ignored new documents "that did not exist before the Region issued permits in 2020" when making its 2025 remand decisions based on the 2020 CEA. Region Response at 15-16.

The Region asks the Board to use the remand to limit the Region's SDWA duties to the information contained in documents predating the 2020 permitting decisions. The Region's proposed limitation on Board review makes no sense, especially as the applicable regulations allow challenges that "were not reasonably ascertainable before the close of public comment." 40

C.F.R. §§ 124.13, .19(a). In seeking to constrain the Board's review, the Region makes two fatal admissions: 1) the Region improperly limited the scope of the remand proceedings to exclude information Petitioners offered; and 2) the Region continues to advocate for an erroneously limited administrative record based on judicial principles that do not make sense during administrative review.

In reissuing its decisional materials without considering information that was not ascertainable in December 2019 when the public comments closed, the Region confirmed it did not update the facts or law its underlying CEA or permitting decisions that are the subject of the current Petition. The Region instead seeks to justify 2025 decisions made on the 2020 CEA by shifting focus to the responses to comments that lack any interdisciplinary analysis. Region Response at 13.

4. Four New Documents are Relevant and Were not Considered by the Region.

The Region asserts that it refused to consider relevant information in four documents when making its remand decision. Region Response at 19. These documents confirm that the Region chose to analyze the permit on remand as if time had stopped in 2000, when in fact, the documents new information relevant to the permitting decisions.

Powertech argues that future operations need not be addressed, while confirming that it has already conducted "resource development drilling" on its Dewey-Terrace project," which is a satellite mine to the Dewey-Burdock Project. *See* Powertech Response at 14 FN3.

The development drilling confirms that the Region has allowed segregated permitting of ongoing implementation of a Powertech proposal to conduct in situ leach mining in a manner that is not segregated by time or space from the proposal that resulted in the permits reissued by the Region in 2025. *Infrastructure Coal. Id*. at 841. Moreover, the scope of Powertech's actual

proposal as it exists in 2025 was squarely addressed by ASLB's finding that the new documents relevant and they demonstrated actual concrete proposals. Petition at 26-29. The Board need not relitigate the ASLB's conclusion that Powertech's proposal is not the same in 2025 as it was in 2020.

The cumulative effects of the additional expanded wellfields and new satellite mines that will impact the environment at the Dewey Burdock site include effects of increasing waste and drilling activity throughout Powertech's mining project that were not disclosed or analyzed by the 2020 CEA. The documents Petitioners submitted into the Board's hearing records support the relief requested by the Petition. Remand Order at 9.

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

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 incorporated by reference its arguments regarding rulemaking from pp. 31-32 of the Original Response. Region Response at 21. Similarly, Powertech incorporated by reference its arguments regarding de facto rulemaking located in its prior Response at 27-30. Petitioners therefore incorporate by reference its January 22, 2024 Reply at 20-22.

The Region and Powertech continued arguments that their engagement in years-long, covert technical regulatory discussions were not a de-facto rulemaking are undermined by the incomplete record in this proceeding. The Region continues to withhold the portions of the administrative record necessary for the Board to make a reasoned review and determination of this issue. *See* Petition at 10-11, 17. Petitioners have put forth competent and compelling evidence of the substantive nature of the discussions alleged and show that they were precedent

setting and far more than merely technical assistance. The Board should remand the permits back to the Region until the Board can be assured that it has before it a competent record upon which to review the issue. *See* Petition at 16-17 ("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 remand the case to the agency for further proceedings." *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575 (10th Cir. 1994)).

Significantly, Petitioners have put forward a limited number of available documents that 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 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).

Instead of defending the permitting decisions on the basis of the records created during the discussions, the Responses ask the Board to accept post-hoc characterizations and deny the Petition by skipping to the merits. Region Response at 28-29; Powertech Response at 20-23. 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 and the *de facto* rulemaking. Remand Order at 8-9.

Neither Response identifies a regulation providing an exception for relevant records created before the formal application was filed. Any such exception, were it to exist, could not exclude the emails and other documents that both Responses seek to explain away as not supporting the merits of Petitioner's *de facto* rulemaking claim, while also arguing that the proffered documents each attempt to characterize can be excluded from the administrative record that informs this Board's review.

The Responses reinforce the detailed argument set forth in the Petition and constitute improper efforts by the Region to avoid Board scrutiny of its improper de-facto rulemaking. Along with an order directing the Region to provide this Board and the parties with a complete administrative record upon which to fully consider the issues, this Board should accept review of the de facto rulemaking issue.

CONCLUSION

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

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STATEMENT OF COMPLIANCE WITH WORD LIMITATION

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

This Reply is approximately 5717 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 12th Day of June, 2025:

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