(Slip Opinion)

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

In re Powertech (USA) Inc. Permit No. SD31231-00000 & SD52173-00000	)	UIC Appeal No. 25-01

[Decided September 12, 2025]

ORDER DENYING REVIEW

Before Environmental Appeals Judges Aaron P. Avila and Ammie Roseman-Orr.

IN RE POWERTECH (USA) INC.

UIC Appeal No. 25-01

ORDER DENYING REVIEW

Decided September 12, 2025

Syllabus

The Oglala Sioux Tribe, Black Hills Clean Water Alliance, and NDN Collective petition the Environmental Appeals Board for review of two Underground Injection Control area permit decisions that U.S. Environmental Protection Agency Region 8 reissued pursuant to the Safe Drinking Water Act following remand by the Board. These reissued permits authorize Powertech (USA) Inc. to engage in underground injection activities associated with uranium mining at the Dewey-Burdock site located in the Black Hills of South Dakota.

The Petition challenges the Region's reissuance of the permits, arguing that the Region improperly excluded documents from the administrative record and violated the Administrative Procedure Act by engaging in de facto rulemaking. The Petition also argues that the Region failed to comply with the Safe Drinking Water Act and its implementing regulations prohibiting any injection activity that will result in contamination of an underground source of drinking water by (a) using insufficient baseline data and hydrogeological analyses and (b) inadequately analyzing the cumulative effects of the project. Finally, the Petition asserts that, due to changed circumstances, the Region violated section 106 of the National Historic Preservation Act when it reissued the permits.

Held: The Board denies the petition for review in its entirety.

(1) With respect to the administrative record, the Board concludes that the Region complied with the Board's directive on remand to ensure that the administrative record was complete under 40 C.F.R. part 124, and the Petition does not demonstrate that the Region improperly excluded documents.

(2) With respect to the Administrative Procedure Act, the Board concludes that the document identified as constituting de facto rulemaking is based on and consistent with existing regulatory requirements, does not set forth any new or additional requirements that have a "binding effect" on the Agency, and was not relied on as a basis for the Region's

permitting decisions. As such, the Petition does not demonstrate that the Region engaged in de facto rulemaking in the context of issuing the Powertech Underground Injection Control permits.

(3) With respect to the Safe Drinking Water Act and its implementing regulations, the Board concludes that the Petition does not demonstrate that the baseline data and hydrogeological analyses that underlie the Region's permitting decisions were insufficient or that the Region's technical determinations with respect to that data and analyses were clearly erroneous. Additionally, the Petition does not demonstrate that the Region clearly erred in analyzing the project's cumulative effects under the Underground Injection Control permitting regulations.

(4) Finally, the Board concludes that the Petition's National Historic Preservation Act argument is outside the scope of the Board's review as established in the remand order, and in any event, the Region has met its National Historic Preservation Act section 106 obligations.

Before Environmental Appeals Judges Aaron P. Avila and Ammie Roseman-Orr.

Opinion of the Board by Judge Roseman-Orr:

I. *STATEMENT OF THE CASE*

This is the second time that the Environmental Appeals Board has been asked to review two Underground Injection Control ("UIC") area permits that Region 8 of the U.S. Environmental Protection Agency issued to Powertech (USA) Inc. for the Dewey Burdock project site located in the Black Hills of South Dakota. These UIC permits were first issued in 2020 and were challenged by the Oglala Sioux Tribe. The Board denied that petition for review in part, preserved two issues, and remanded the permit decisions in part, directing the Region to, among other things, ensure that the administrative record was complete and revise its response to comments. *In re Powertech (USA) Inc.*, 19 E.A.D. 23, 46-47 (EAB 2024) ("*Powertech I*"). Following the Board's order, the Region reissued the permits to Powertech with no changes. The Oglala Sioux Tribe, together with Black Hills Clean Water Alliance, and NDN Collective have now petitioned the Board for review of the two reissued UIC area permit decisions. The petition challenges the Region's actions on remand, re-raises the two issues that the Board had preserved, and advances a new National Historic Preservation Act challenge.

For the reasons set forth below, the Board denies the petition in its entirety.

II. *RELEVANT FACTUAL AND PROCEDURAL SUMMARY*

The two UIC area permits at issue authorize Powertech to engage in underground injection activities necessary for the in-situ recovery of uranium at the Dewey-Burdock project site. *Powertech I*, 19 E.A.D. at 25. The project site consists of approximately 10,580 acres located in the southern Black Hills of South Dakota. *Id.* The work Powertech seeks to perform at the project site requires multiple approvals by state and federal agencies, including the two UIC area permits, a Class III permit and a Class V permit, and a source material license from the Nuclear Regulatory Commission ("NRC").[1] *Id.* at 26. The Board's *Powertech I* opinion recounts the history of the permit applications and proceedings leading up to the Region's issuance of the 2020 UIC area permits and includes a detailed factual discussion of the permits. We do not repeat that information here. For context, however, we describe below our decision on the prior petition for review, the Region's actions following remand, and the current petition.

A. *The Board's Review of the 2020 Petition*

The Oglala Sioux Tribe originally petitioned the Board in December 2020, seeking review of the Region's final area permit decisions. Petition for Review (Dec. 24, 2020) ("2020 Pet."). The Tribe challenged the 2020 UIC permit decisions on various grounds, based on alleged violations of the National Historic Preservation Act ("NHPA"), the National Environmental Policy Act ("NEPA"), the Safe Drinking Water Act ("SDWA"), and the Administrative Procedure Act ("APA"). The Board stayed review of that petition pending resolution of litigation before the U.S. Court of Appeals for the District of Columbia Circuit involving whether the NRC had complied with NHPA section 106 in issuing its source material license to the Dewey-Burdock project. *See Oglala Sioux Tribe v. U.S. Nuclear Regul. Comm'n*, 45 F.4th 291 (D.C. Cir. 2022). The matter before the D.C.

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[1] The Class III area permit authorizes the construction and operation of injection wells in fourteen wellfields located within the permit area. Region 8, U.S. EPA, *Underground Injection Control Final Class III Area Permit, Area Permit No. SD31231-00000* pt. I.B, at 1 (Mar. 2025) (A.R. 1150) ("Final Class III Permit"). The Class V permit authorizes the construction and operation of up to four deep injection wells to dispose of in-situ recovery process waste fluids after treatment to ensure that the injected fluids are below radioactive or hazardous waste levels. Region 8, U.S. EPA, *Underground Injection Control Final Class V Area Permit, Area Permit No. SD52173-00000* pt. I, at 1 (Mar. 2025) (A.R. 1151) ("Final Class V Permit"); Region 8, U.S. EPA, *Response to Public Comments, Class III Area Permit No. SD31231-00000, Aquifer Exemption Decision and Class V Area Permit No. SD52173-00000*, at 1 (Nov. 24, 2020) (A.R. 1).

Circuit was relevant to the challenges the Oglala Sioux Tribe had filed with the Board because the Region had designated the NRC as the lead agency for compliance with section 106 of the NHPA for purposes of the Dewey-Burdock project; NRC compliance with that statute would have also meant EPA compliance. *Powertech I*, 19 E.A.D. at 24. The D.C. Circuit ruled in favor of the NRC and following that decision, the Board issued an order denying review of the NHPA section 106 issue, concluding that the Region had met its section 106 obligations and identifying remaining issues for review. *Oglala Sioux Tribe*, 45 F.4th at 306; *In re Powertech (USA) Inc.*, UIC Appeal No. 20-01, at 20-29 (Nov. 16, 2023) (Order Denying Motion to Amend Petition for Review, Denying Review on the Petition's National Historic Preservation Act Section 106 Issue, and Identifying Issues in the Petition Remaining for Resolution) ("2023 Order").[2]

In September 2024, the Board denied review in part and remanded in part the Region's 2020 UIC permit decisions. *Powertech I*, 19 E.A.D. at 31, 47. The Board denied review of issues related to NHPA section 110 and NEPA. *Id*. at 31-33, 37-42. The Board remanded in part concluding that the Region had "applie[d] an incorrect legal standard regarding the administrative record." *Id.* at 42. On remand, the Board directed the Region to "apply the correct legal standard for developing the administrative record, ensure that the record includes all materials required by the part 124 regulations," and "revise its response to comments document" as appropriate. *Id.* at 46. The Board concluded that it was unable to decide the remaining SDWA and APA claims due to the state of the administrative record and preserved these issues for review. *Id.* at 45-46 & n.23. In doing so, the Board stated: "[t]o the extent that these preserved issues remain after remand, the Tribe may, if it so chooses, raise these issues in a new petition seeking review of the Region's action on remand," and the Tribe, the Region, or Powertech may

[2] As discussed in the Board's 2023 Order, the D.C. Circuit found that the NRC had satisfied its consultation obligations under the NHPA, explaining that (1) the NRC had sufficiently engaged with the Tribe for over a two-year period, (2) the NRC can satisfy its NHPA obligations without conducting a survey or conducting a survey in a specific way, and (3) the NHPA regulations "expressly contemplate" a phased approach to the identification and evaluation of historic properties. 2023 Order at 22-29. In describing the NRC's consultation activities, the D.C. Circuit stated, among other things, that the NRC had conducted a field survey of the Dewey-Burdock area with seventeen participating tribes and received reports from three tribes identifying cultural resources and historic properties in the area; the Oglala Sioux Tribe declined to participate because it disagreed with the parameters of both the survey and participation. *Oglala Sioux Tribe*, 45 F.4th at 297.

incorporate by reference their arguments concerning the preserved issues into any new appeal arising from the remand action. *Id.* at 46 n.23.

B. *The Region's Actions on Remand*

In response to the Board's final order in *Powertech I*, the Region reviewed and added documents to the administrative record, issued a Determination on Remand, revised its response to comments document, and reissued the UIC area permits with no changes. *See* Region 8, U.S. EPA, *Revised Response to Public Comments* at 4 (Mar. 14, 2025) (A.R. 1153) ("Revised Resp. to Cmts."). The Region did not reopen the public comment period. Region 8, U.S. EPA, *Determination on Remand* at 3 (Mar. 14, 2025) (A.R. 1152) ("Determination on Remand").

The Region provided several clarifications in its Determination on Remand. First, the Region acknowledged the Board's conclusion in *Powertech I* that the attachments to the Tribe's 2017 comments were required to be part of the administrative record under 40 C.F.R. § 124.18(b)(1). *Id.* at 1-2. The Region also clarified that the Tribe's 2017 comments and attachments had in fact been part of the original 2020 administrative record, *id.* at 1, which confirmed the Board's prior observation, *see Powertech I*, 19 E.A.D. at 44 n.19. Second, the Region stated that it had "conducted a review to determine whether the administrative record needed to be revised in accordance with the regulations at 40 C.F.R. § 124.9 and § 124.18" and updated the administrative record with additional documents, including earlier iterations of the permit applications and communications. Determination on Remand at 1, 3; Certified Index of Administrative Record at 58-69 (filed Apr. 29, 2025) ("2025 Certified Index") (listing supplemental documents on remand at documents numbers 964 through 1153). The Region acknowledged that the earlier iterations of the permit applications are part of the administrative record under § 124.9(b)(1) and clarified that it had considered and rejected those materials as technically deficient and as having been superseded by the last-filed applications (the 2013 Class III application and 2012 Class V application). *See* Determination on Remand at 2. Regarding the communications added to the record on remand, the Region explained that it had considered them prior to making the permitting decisions in November 2020. *Id.* at 3. It also explained that the documents added to the record do not contain any new substantive information. *Id*.

Additionally, the Region revised its responses to comments #183, #184, and #185, which concerned communications between the Region and the uranium industry, including Powertech; the alleged "de facto rulemaking/guidance" document; and the contents of the administrative record. *See* Revised Resp. to Cmts. at 1-4. In those revised responses, the Region clarified that the documents it

added to the record had been considered by the Region prior to making the 2020 permit decisions and explained that "[b]ecause there was no information identified that raised new issues or substantial new questions," the Region "reiss[ued] the final permits with no changes from the 2020 permits." *Id*. at 1; *see also* Determination on Remand at 2-3.

C. *The 2025 Petition for Review*

Following the Region's reissuance of the permits, the Oglala Sioux Tribe, Black Hills Clean Water Alliance, and NDN Collective sought review with the Board. Petition for Review (Apr. 11, 2025) ("2025 Pet."). Their 2025 petition (1) challenges the Region's actions on remand; (2) reasserts the preserved SDWA and APA issues, incorporating by reference the prior petition the Tribe had filed; and (3) advances a new NHPA section 106 challenge[3] *See id.* at 2-3. With respect to the Region's actions on remand, the 2025 petition argues that the administrative record is still incomplete, and that the Region failed to adequately comply with the Board's directive on remand. *Id*. at 10-11, 14. With respect to the preserved issues, the petition maintains that the Region failed to comply with the SDWA and UIC regulations pertaining to migration of mining fluid and cumulative effects analysis and engaged in de facto rulemaking in contravention of APA rulemaking notice and comment procedures. *See id*. at 13, 15-16, 25-30. Lastly, with respect to the NHPA, the petition argues that, due to changed circumstances, the Region violated section 106 when it reissued the UIC permits. *Id*. at 17-25.

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[3] Of the three Petitioners, only the Tribe challenged the 2020 UIC permits. Black Hills Clean Water Alliance and NDN Collective did not. As stated above, the Board's September 2024 order provided that "[a]nyone dissatisfied with the Region's decision on remand" could file a petition "limited to the issues considered on remand[,] and any modifications made to the permits as a result of the remand," of which there were none. *Powertech I*, 19 E.A.D. at 46 n.23. With respect to the preserved issues, the September 2024 order indicated that, to the extent these issued remain after remand, *the Tribe* could raise them in a new petition for review following remand. *Id.* at 47 n.23.

Powertech challenges the participation of Black Hills Clean Water Alliance in this appeal, and both the Region and Powertech challenge NDN Collective's participation. We need not address the arguments against the participation of these two Petitioners, given that the Tribe's participation is not in question. For ease of discussion, we address all arguments raised in the petition as being raised by the Tribe.

III. *LEGAL FRAMEWORK*

The aim of the SDWA is to protect groundwater that is, or can reasonably be expected to become, a source of drinking water. *See* 42 U.S.C. § 300h(d)(2). In accordance with its authority, EPA has issued regulations that establish minimum requirements for underground injection activities to protect underground sources of drinking water ("USDW") from contamination resulting from deep well injection. *See* 40 C.F.R. pts. 144-148, § 144.1(b)(1).

The EPA UIC program regulates underground injection based on the type, or "Class," of well. *Id.* §§ 144.1(g), .6; *see also id.* § 146.5. Relevant here are Class III and V injection wells. Class III wells are used for extraction of minerals, such as uranium, and Class V wells are used to dispose of non-hazardous fluids, such as treated process waste fluids from uranium mining. *Id*. §§ 144.6(c)(2), (e), 144.80(c), (e), 146.5(c), (e). Wells can be authorized on an individual basis or, when certain conditions are met as is the case here, on an area basis. *Id*. § 144.33.

Underground injections must be authorized by permit or rule. *Id*. §§ 144.1(e), (g), .11. Under the regulations, "no injection shall be authorized by permit or rule if it results in the movement of fluid containing any contaminant into [USDWs], if the presence of that contaminant may cause a violation of any primary drinking water regulation * * * or may adversely affect" human health. *Id*. § 144.1(g). To achieve these objectives, the UIC regulations establish general permitting and program requirements (part 144), as well as more specific technical criteria and standards (part 146). 40 C.F.R. § 144.1(f)(1). The UIC permitting process is designed to include multiple phases. *Powertech I*, 19 E.A.D. at 28 n.4.

The prohibition of USDW contamination has also been codified in § 144.12 as a general requirement for all UIC programs that applies through all the different stages of injection activities. *Id.* § 144.12(a). In addition to this general requirement, the UIC regulations require delineation of an area of review to prevent contamination of USDWs. *Id.* § 146.6. The area of review serves to identify the area surrounding an injection well or wells where USDWs could be endangered by migration caused by the incremental pressure of injection activities. U.S. EPA Office of Drinking Water, *Statement of Basis and Purpose: Underground Injection Control Regulations* at 14 (May 1980), https://www.epa.gov/uic/uic-program-guidance-clarifying-memorandums. Permit authorities are required to consider the effects of injection within the area of review when determining whether to authorize injection. For area permits, the area of review consists of "the project area plus a circumscribing area the width of which is either 1⁄4 of a mile *or* a number calculated

according to the criteria set forth in § 146.[]6."[4] 40 C.F.R. § 144.3 (emphasis added). Section 146.6 establishes two methods for determining the area of review: "zone of endangering influence" and "fixed radius." *Id.* § 146.6(a)-(b). Under the UIC regulations, the Agency retains discretion to choose the method appropriate to determine the area of review. *Id.* § 146.6; *see also In re Windfall Oil & Gas, Inc.*, 16 E.A.D. 769, 777 (EAB 2015).

In issuing UIC permits, the Region is also obligated to consider other applicable federal statutes, including the NHPA. 40 C.F.R. § 144.4(b). Section 106 of the NHPA requires federal agencies with "authority to license any undertaking," to "take into account the effect of the undertaking on any historic property." NHPA § 106, 54 U.S.C. § 306108; 2023 Order at 6 n.4. To fulfill this obligation, the Region designated the NRC as the lead agency for NHPA section 106 compliance purposes for the Dewey-Burdock project and signed a programmatic agreement to effectuate the designation. 2023 Order at 7; *see Programmatic Agreement Among U.S. Nuclear Regulatory Commission, U.S. Bureau of Land Management, South Dakota State Historic Preservation Office, Powertech (USA) Inc., and Advisory Council on Historic Preservation Regarding the Dewey-Burdock in Situ Recovery Project Located in Custer and Fall River Counties South Dakota* (Mar. 19, 2014) (A.R. 671) ("Programmatic Agreement").

IV. *PRINCIPLES GOVERNING BOARD REVIEW*

The Board's review of UIC permits is governed by Agency permitting regulations at 40 C.F.R. part 124, which authorize parties to file petitions for review of EPA permit decisions. 40 C.F.R. § 124.19(a)(1). In promulgating these regulations, EPA intended that this "review should be only sparingly exercised." Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,412 (May 19, 1980); *see also In re Beeland Grp., LLC*, 14 E.A.D. 189, 195-96 (EAB 2008).

In any appeal from a permit decision issued under part 124, the petitioner bears the burden of demonstrating that review is warranted. *See* 40 C.F.R. § 124.19(a)(4). In considering an appeal, the Board first evaluates whether the petitioner has met threshold procedural requirements, including, among other things, whether an issue has been preserved for Board review. *See* 40 C.F.R.

[4] The text of this provision references § 146.06, which in the regulations appears as §146.6.

§§ 124.13, .19(a)(2)-(4); *see also In re Penneco Env't Sols., LLC*, 17 E.A.D. 604, 617-18 (EAB 2018); *In re Seneca Res. Corp.*, 16 E.A.D. 411, 412 (EAB 2014).

The Board has discretion to grant or deny review of a permit decision. 40 C.F.R. § 124.19; *see In re Avenal Power Ctr., LLC*, 15 E.A.D. 384, 394 (EAB 2011), *vacated & remanded on other grounds sub nom. Sierra Club v. EPA*, 762 F.3d 971 (9th Cir. 2014). The petitioner must demonstrate that the permit decision is based on a clearly erroneous finding of fact or conclusion of law or involves an exercise of discretion that warrants review. 40 C.F.R. § 124.19(a)(4)(i)(A)-(B); *see, e.g., In re La Paloma Energy Ctr., LLC*, 16 E.A.D. 267, 269 (EAB 2014). To meet this standard, it is not enough for a petitioner to simply repeat comments previously submitted on the draft permit. Where a petitioner raises an issue that the permitting authority addressed in the response to comments document, the petitioner must provide a citation to the comment and response and explain why the response was clearly erroneous or otherwise warrants review. 40 C.F.R. § 124.19(a)(4)(ii); *In re City of Lowell*, 18 E.A.D. 115, 131 (EAB 2020); *see In re City of Taunton*, 17 E.A.D. 105, 111, 180, 182-83, 189 (EAB 2016) *aff'd*, 895 F.3d 120 (1st Cir. 2018), *cert. denied*, 586 U.S. 1184 (2019).

"When evaluating a challenged permit decision for clear error, the Board examines the administrative record that serves as the basis for the permit to determine whether the permit issuer exercised 'considered judgment.'" *City of Lowell*, 18 E.A.D. at 132 (citing *In re Gen. Elec. Co.*, 17 E.A.D. 434, 560-61 (EAB 2018)); *see In re Ash Grove Cement Co*., 7 E.A.D. 387, 417-18 (EAB 1997). The permit issuer must articulate with reasonable clarity the reasons supporting its conclusion and the significance of the crucial facts it relied on when reaching its conclusion. *E.g., In re Shell Offshore, Inc.*, 13 E.A.D. 357, 391 (EAB 2007). As a whole, the record must demonstrate that the permit issuer "duly considered the issues raised in the comments" and ultimately adopted an approach that "is rational in light of all information in the record." *Id.* at 386; *see In re NE Hub Partners, LP*, 7 E.A.D. 561, 568 (EAB 1998), *pet. for review denied sub nom. Penn. Fuel Gas, Inc. v. EPA*, 185 F.3d 862 (3d Cir. 1999).

"On matters that are fundamentally technical or scientific in nature, the Board typically [will] defer[] to a permit issuer's technical expertise and experience, as long as the permit issuer adequately explains its rationale and supports its reasoning in the administrative record." *See In re Muskegon Dev. Co*., 18 E.A.D. 88, 90 (EAB 2020); *In re Jordan Dev. Co*., 18 E.A.D. 1, 5 (EAB 2019).

V. *ANALYSIS*

The issues presented in this appeal are as follows: whether the Region (a) improperly excluded documents from the administrative record; (b) engaged in de facto rulemaking in violation of the APA; (c) clearly erred under the SDWA and its implementing regulations in making its permit decisions; and (d) violated NHPA section 106 in reissuing the permits. We address each of these issues, in turn, below.

A. *The Tribe Has Not Demonstrated that the Region Improperly Excluded Documents from the Administrative Record*

EPA regulations specify the contents of the administrative record for both a draft and final permit. 40 C.F.R. §§ 124.9 (listing materials required to be part of the administrative record for a *draft* permit), 124.18 (listing materials required to be part of the administrative record for a *final* permit, which includes the administrative record for the draft permit). In *Powertech I*, the Board directed the Region on remand to, among other things, "apply the correct legal standard for developing the administrative record" and "ensure that the record includes all materials required by the part 124 regulations." *Powertech I*, 19 E.A.D. at 42, 46.

On remand, the Region conducted a review of the administrative record and added 189 documents to the administrative record. *See* Determination on Remand at 1, 3; 2025 Certified Index at 58-69. Most of those documents comprised complete copies of earlier permit applications and attachments to those applications. *See* 2025 Certified Index at 58-69. The Region acknowledged that the application materials were part of the administrative record under § 124.9(b)(1) and clarified that it considered the prior iterations of the applications before issuing the 2020 permits and that those applications were rejected as technically deficient and superseded by the last-filed applications (referring to the 2013 Class III application and 2012 Class V application). *See* Determination on Remand at 2; Revised Resp. to Cmts. at 4 (Cmt. #185). The Region also added communications between the Region and (1) Powertech, (2) tribes, and (3) other entities, and explained that it considered these communications prior to making the permitting decisions in November 2020. *See* Determination on Remand at 3. The Region stated that "[n]one of the documents added to the record contain any new substantive information." *Id*.

Notwithstanding the Region's actions on remand, the Tribe continues to argue that the administrative record is incomplete. The Tribe contends that the Region failed to comply with the Board's directive on remand, 2025 Pet. at 10, and violated 40 C.F.R. § 124.9(b)(1) by not including in the record "the information

and data provided by the Applicant during its year-long pre-application discussion," *id.* at 14. The Tribe contends that the Region's "omission of relevant information" from the record, and specifically the exchanges between the Region and Powertech that occurred prior to submission of the permit applications, "warrants withdrawal of the permit and remand." *Id*. at 14, 17. [5]

The Region denies that it erroneously omitted documents from the administrative record on remand, stating that it "devoted significant time to a detailed search and review of records dating back over a decade to determine whether there were additional documents that should be added to the administrative record." EPA Region 8's Response to Petition for Review at 1, 26-27 (May 9, 2025) ("2025 Reg.'s Resp. Br."). The Region further states that the "search did not elicit any additional pre-application documents other than those already in the administrative record." *Id*. at 27; *see* Revised Resp. to Cmts. at 4 (Cmt. #185).

As the Board has repeatedly recognized, there is a "strong presumption that the Agency did not improperly exclude documents from the administrative record," and it is the petitioner that bears the burden of overcoming this presumption. *In re Gen. Elec. Co.*, 18 E.A.D. 575, 609 (EAB 2022) (citing *In re Town of Newmarket*, 16 E.A.D. 182, 242 (EAB 2013)), *pet. for review denied sub nom. Housatonic River Initiative v. EPA*, 75 F.4th 248 (1st Cir. 2023). Conclusory statements that the Region improperly excluded documents from the administrative record are not sufficient, and a petitioner needs to identify reasonable, non-speculative grounds for its belief that the Region considered documents in support of the permits that were not included in the record. *Newmarket*, 16 E.A.D. at 242 (citing *Nat'l Mining Ass'n v. Jackson*, 856 F. Supp. 2d 150, 155-56 (D.D.C. 2012)). For the reasons discussed below, the Tribe has not met its burden to show that the Region improperly excluded documents from the administrative record.

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[5] The Tribe also argues that the Region failed to comply with the Board's remand order by not referencing the term "technical assistance" in its revised response to comments document. 2025 Pet. at 16. We disagree. The Board did not require the Region on remand to reference or define the term "technical assistance." Rather, the Board explained that the Region cannot exclude documents from the administrative record because they constitute "technical assistance," as that term is untethered to the part 124 regulations that define the content of the record for final permits. *Powertech I*, 19 E.A.D. at 44-45 n.20. The Region conducted a thorough review to ensure that all materials required by the part 124 regulations were included in the record and revised the response to comments document consistent with the Board's direction. That is all the Board's remand order required.

First, the Region complied with the Board's direction on remand. The Region correctly acknowledges that the pre-application documents appended to the Tribe's 2017 comments are contained in the administrative record. Determination on Remand at 1-2. As the Board explained in *Powertech I*, these pre-application discussions were part of the administrative record pursuant to § 124.18(b)(1) because they were appended to the Tribe's 2017 comments to the draft permit. *See Powertech I*, 19 E.A.D. at 43-44 (explaining that § 124.18(b)(1) requires that "all comments received during the public comment period" be included in the administrative record). As such, the contention that the Region "has failed to include *any* of the pre-application information and discussions in the administrative record" is incorrect. *See* 2025 Pet. at 14 (emphasis added).

Second, the Tribe's reliance on 40 C.F.R. § 124.9(b)(1) to support the argument that pre-application documents are missing from the record is misplaced. That section provides that the administrative record for the draft permit includes the permit "application, if required, and any supporting data furnished by the applicant." 40 C.F.R. § 124.9(b)(1). Section 124.9(b)(1) does not require that the administrative record include all communications between an applicant and the Region prior to submission of a permit application.[6] This includes Attachment 34 to both the 2020 and the 2025 petitions, which the Tribe cites as evidence that the record is incomplete. 2025 Pet. at 13-14. Attachment 34 consists of email exchanges between the Region and Powertech that took place prior to the submission of the Dewey-Burdock permit applications and concerns Powertech's Centennial site in Colorado (not the Dewey-Burdock project). 2025 Reg.'s Resp. Br. at 27. These email exchanges were not submitted to the Region during the public comment period. *See* 40 C.F.R. § 124.13. Further, the Region maintains that, even if the content of some of the emails in Attachment 34 related to the Dewey Burdock site, there is no relevant information or supporting data about the Dewey-Burdock permits in Attachment 34. 2025 Reg.'s Resp. Br. at 27. The Tribe has not demonstrated that Attachment 34 is required to be part of the administrative record under the part 124 regulations.

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[6] The Tribe argues that neither Powertech nor the Region have identified an exception to the regulations that would warrant the exclusion of the pre-application communications. Petitioners' Reply at 20 (June 12, 2025) ("2025 Reply"). This argument, however, is premised on the incorrect assumption that part 124 regulations require the inclusion of *all* pre-application exchanges between the permitting authority and the applicant. As explained above, the regulations contain no such requirement.

Third, the Tribe provides no support for the assertion that "[t]he Region continues to withhold portions of the administrative record necessary for the Board to make a reasoned review and determination of this issue," implying that the Region is intentionally omitting documents that are required to be in the record. Petitioners' Reply at 18 (June 12, 2025) ("2025 Reply Br."); *see also* 2025 Pet. at 17 (arguing "[t]he omission of relevant information from the record demonstrates [ ] EPA's refusal to consider an important aspect of the problems at hand"). To the extent that bad faith by the Region is implied, neither the 2025 petition nor the reply brief provide evidence of bad faith or bias in the Region's decision-making to overcome the strong presumption that the administrative record is complete, and that the Region acted with "honesty and integrity." *See Newmarket*, 16 E.A.D. at 243 (stating that "[t]he standard for establishing bad faith or bias in decisionmaking is very high"). Conclusory allegations, such as those raised here, are not sufficient to demonstrate that the Region intentionally omitted documents from the administrative record that the Region considered and relied on in issuing the Dewey-Burdock permits. *Cf. id*.

For all of these reasons, the Tribe has not demonstrated that the Region improperly excluded documents from the administrative record.

B. *The Tribe Has Not Demonstrated that the Region Engaged in De Facto Rulemaking in Violation of the APA*

The Board now turns to the Tribe's preserved argument that the Region violated the APA by "conducting a de facto rulemaking with respect to the agency's regulatory requirements for UIC permitting." 2025 Pet. at 11 (incorporating by reference the arguments raised in pages 42-52 of the 2020 petition).

The APA establishes the rulemaking procedures used by federal administrative agencies. *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 95 (2015). Rulemaking is defined as the "agency process for formulating, amending, or repealing a rule," 5 U.S.C. § 551(5), and rules, in turn, are defined to include "agency statement[s] of general or particular applicability and future effect" that are designed to "implement, interpret, or prescribe law or policy," 5 U.S.C. § 551(4); *Perez*, 575 U.S. at 95-96. Rules issued, or that should be issued, through APA notice and comment rulemaking procedures are referred to as "legislative rules." *See Gen. Elec. Co. v. EPA*, 290 F.3d 377, 381 (D.C. Cir. 2002). Legislative rules "implement existing laws and impose a new duty on the regulated community." *In re Charles River Pollution Control Dist.*, 16 E.A.D. 623, 645 (EAB 2015). The D.C. Circuit has explained that the "ultimate focus" for determining whether an agency action amounts to a legislative rule is the

assessment of "whether the agency action binds private parties or the agency itself with the 'force of law.'" *Gen. Motors Corp. v. EPA*, 363 F.3d 442, 448 (D.C. Cir. 2004) (quoting *Molycorp., Inc. v. EPA*, 197 F.3d 543, 545 (D.C. Cir. 1999)); *Gen. Elec. Co.*, 290 F.3d at 382; *see Iowa League of Cities v. EPA*, 711 F.3d 844, 862 (8th Cir. 2013) (adopting the D.C. Circuit's approach of analyzing whether an action has a binding effect on private parties as the "ultimate focus"). In addressing this question, the Board has previously explained, the "'ultimate focus' of the inquiry into whether a rule is * * * legislative 'is whether the agency action [takes on] the fundamental characteristics of a regulation, i.e., that it has the force of law.'" *Charles River*, 16 E.A.D. at 647 (quoting *Gen. Motors Corp.*, 363 F.3d at 448).

The Tribe argues that the Region developed a de facto rule with respect to how the agency will implement its SDWA UIC permitting program related "to ISL [In-Situ Leaching] mining and processing of uranium." 2020 Pet. at 45. In support of its de facto rulemaking argument, the Tribe identified a 2008 document that is watermarked "DRAFT" and entitled "Discussion of Zone of Influence, Area of Review, and the Aquifer Exemption Boundary for Class III Injection Wells used for the In-Situ Leaching (ISL) of Uranium" ("Discussion Document") as constituting a de facto rule.[7] 2025 Pet. at 11. (citing attach. 30 to the 2020 Pet.); *see* Oglala Sioux Tribe, *Comments and Attachments Opposing the Dewey-Burdock Project*, at 1671-75 (2017) (A.R. 644) ("Tribe's Comments on 2017 Draft Permits"). The Tribe argues that the Discussion Document "defin[es] critical terms in the EPA's UIC regulations" and that these terms constitute "binding norms" that should have been developed through an APA notice and comment rulemaking

[7] During oral argument regarding the Tribe's 2020 petition, the Board sought clarification from the Tribe as to which document or documents it alleged constituted de facto rulemaking. Oral Argument Transcript at 36-39 (Mar. 14, 2024). The Tribe asserted that the Discussion Document was "the best document that [we] have been able to find that demonstrates the specific definitions from the regulations that * * * Region 8 was defining with industry to the exclusion of the public" but that there was no way to know whether there "may be more" examples of de facto rulemaking since the Tribe argued that the administrative record was incomplete. *Id*. at 37-39. As the Tribe neither references nor cites any of the documents that the Region added to the administrative record on remand in support of their de facto rulemaking argument, the Board focuses its analysis on the Discussion Document—the only document the Tribe has identified as constituting a de facto rule.

process. 2020 Pet. at 48, 50; *see* 2025 Pet. at 11, 13.[8] Although the Tribe does not make a clear connection between its de facto rulemaking argument and its challenge to the permits, we presume the Tribe's argument to be that the Region relied on the alleged de facto rule in the Discussion Document when it approved Powertech's UIC permits.[9] *See, e.g.*, 2025 Pet. at 13 (suggesting that the de facto rule was developed "with an eye toward approving Powertech's application"); 2020 Pet.

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[8] The Tribe also points to email communications between the Region and Powertech as "evidence" or "examples" that the Discussion Document is the result of de facto rulemaking. 2025 Pet. at 11-12 ("EPA attempts to characterize the discussions as designed to inform the operator of EPA requirements, but the emails demonstrate the opposite – the industry providing EPA its preferred regulatory definitions"); 2025 Reply Br. at 18-19 ("Petitioners have put forth competent and compelling evidence of the substantive nature of the discussions alleged and show that they were precedent setting"); 2020 Pet. at 45-46 (stating that the Tribe attached the email documents "as evidence of relevant factors EPA ignores by improperly omitting them from the existing public record"); *see* Oral Argument Transcript at 39 (Mar. 14, 2024) ("the emails are by way of example to show the extent of the detailed communications between industry and EPA Region 8"). In the revised response to comments, the Region acknowledges that it communicated with Powertech throughout the application and review process and explained that this is a normal part of the application process that "[n]either the Safe Drinking Water Act nor its implementing regulations prohibit." Revised Resp. to Cmts. at 2 (Cmt. #183). The Tribe does not refute that such communications are expressly contemplated by the UIC regulations. Nor does the Tribe explain how the contents of the emails demonstrate that the Region established new UIC requirements in the Discussion Document. In any case, these emails do not alter our assessment of the effect of the Discussion Document.

[9] To the extent that the Tribe is challenging the Discussion Document as an alleged "de facto rule" in isolation, the Tribe's argument would fall outside the scope of a petition for review of a permit appeal. *See* 40 C.F.R. § 124.19(a)(4)(i) (the petition for review must identify the contested permit condition or other specific challenges to the permit decision); *City of Taunton*, 17 E.A.D. at 192-93 n.78 (stating that an argument must identify how it relates to the permit decision so as to provide a basis for review). Additionally, to the extent that the Tribe is challenging the adequacy of the UIC regulations, *see* 2020 Pet. at 51-52, the Board has repeatedly held that a permit appeal to the Board is not the proper forum for such challenges, *see Powertech I*, 19 E.A.D. at 41-42. *See also Jordan Dev. Co.*, 18 E.A.D. at 12; *In re FutureGen Indus. All., Inc.*, 16 E.A.D. 717, 724 (EAB 2015), *pet. for review dismissed as moot sub nom. DJL Farm L.L.C. v. EPA*, 813 F.3d 1048 (7th Cir. 2016).

at 50 (same). Thus, we examine both the alleged de facto rulemaking and the Region's alleged reliance on that "rule" in the context of the permits at issue.

According to the Region, the Discussion Document was "created by a Region 8 staff member" for discussions with Powertech and its consultants to help them understand the information required to be included in a permit application, including "the site-specific information that is required by existing regulations [for the area of review and aquifer exemption boundary]," and that it did not establish binding norms. Revised Resp. to Cmts. at 2-3 (Cmt. #184); *see* 2025 Reg.'s Resp. Br. at 23-24; *see also* Region 8, U.S. EPA, *Response to Public Comments, Class III Area Permit No. SD31231-00000, Aquifer Exemption Decision and Class V Area Permit No. SD52173-00000*, at 232-33 (Nov. 24, 2020) (A.R. 1) ("Resp. to Cmts.") (similar). Based on the Board's review of the record, we agree.

The Discussion Document does not on its face purport, and the regional staff member did not have authority, to bind the Agency or the permit issuer. The document primarily provides background information on the UIC regulatory requirements, including the factors to be considered for UIC permit applications. The terms in the document that the Tribe identifies as "binding norms," include "area of review," "zone of influence," and "aquifer exemption boundary." 2020 Pet. at 48, 50; 2025 Pet. at 11. Nowhere does the Tribe offer any explanation of how the Discussion Document's description of the identified terms conflicts with the UIC regulations or how the document allegedly imposes "binding" requirements that are different from those already contained in regulations. Rather, based on our review, each of these terms are either defined in or comport with the UIC regulations. *See* 40 C.F.R. §§ 144.7, 146.3, .4, .6.

For example, the Discussion Document introduces the "area of review" concept by quoting the relevant regulation:

> The method for determining Area of Review around an injection well or injection project area is defined in 40 [C.F.R. §] 146.3 as "the area surrounding an injection well described according to the criteria set forth in §146.06 or in the case of an area permit, the project area plus a circumscribing area the width of which is either 1/4 of a mile or a number calculated according to the criteria set forth in §146.06." Regulation 146.06 states that the "Area of Review for each injection well or each field, project or area [* * *] shall be determined [* * *]" using the zone of endangering influence calculation in 146.06(a) *or* a fixed radius according to 146.06(b). (Specific regulations are located at the end of this document for reference.)

Discussion Document at 1 (emphasis added). As shown above, the Region quotes the regulatory requirements for delineating the area of review, while also noting the inclusion of those regulations at the end of the document—the Region is clearly basing the "discussion" on the regulations. At the same time, the Discussion Document recognizes that the Region has discretion under this regulatory provision to choose between the "zone of endangering influence" method and the "fixed radius" method to determine the appropriate area of review. *See id*. at 2; 40 C.F.R. § 146.6. The Discussion Document goes on to explain that the zone of endangering influence method is not appropriate for delineating the area of review for Class III injection permits for in-situ mining because that method is based on injection wells, with no extraction taken into account. Discussion Document at 2. The Region explains that the boundary of the area of review for such permits should be "justified using hydrologic modeling of [worst-case] scenario excursions," taking into account the regulatory factors listed in § 146.6(b), and that "[t]he permit application should include a discussion of how the Area of Review was determined, including pertinent hydrologic modeling results that support the proposed boundary locations." *Id*. at 3. The Region further explained that "the discussion should also include how applicable factors [in § 146.6(b)] were taken into consideration." *Id*. This discussion is fully consistent with the regulations and the Region's authority thereunder.

The Discussion Document simply explains existing regulations, including the factors to be considered in reviewing an application, and does not create new legal authority or impose new requirements beyond the existing statute and regulations.

In addition, the Region does not rely on the Discussion Document as the basis for its permit determinations. In the response to comments documents and fact sheets the Region relies on the SDWA and UIC regulations as justification for its permit determinations. *See, e.g*., Revised Resp. to Cmts. at 2-3 (Cmt. #184) (explaining the Region's area of review determination based on UIC regulations); Resp. to Cmts. at 232 (Cmt. #184) (same); Region 8, U.S. EPA, *Fact Sheet, EPA Permit No. SD31231-00000*, at 30-31, 98-101 (Aug. 26, 2019) (A.R. 171) ("2019 Fact Sheet"); Region 8, U.S. EPA, *Fact Sheet, EPA Permit No. SD31231- 00000*, at 29, 97-100 (Mar. 3, 2017) (A.R. 174) ("2017 Fact Sheet"). The Fact Sheets contain an extensive explanation in support of the permit conditions and the basis for the permit decisions, including descriptions of how

these decisions complied with the relevant regulations.[10] *See* 2017 Fact Sheet at 29- 54; 2019 Fact Sheet at 30-55; *see also* 2025 Reg.'s Resp. Br. at 28. Again, the Tribe does not refute that the Region relied on the regulations in making its permit decisions or argue that the Region's decisions were based on the Discussion Document. Because the Region did not rely on the Discussion Document in making its permit decisions, the Tribe has not, and indeed cannot, demonstrate the Region relied on "de facto" rulemaking in granting Powertech's UIC permits.

As a final note, we observe that this case stands in contrast to other Board cases where we have addressed legislative rulemaking, as those prior cases involved situations where the region, in fact, relied on the alleged "legislative rule" as a basis in the permitting decision. *See Charles River*, 16 E.A.D. at 645 (rejecting petitioner's challenge to a document that the region cited as providing the programmatic basis for listing parties as co-permittees); *see also City of Lowell*, 18 E.A.D. at 141-143 (discussing, although not ultimately reaching, the petitioner's de facto rulemaking claim where the region relied on Agency guidance in establishing a permit condition). As explained above, that is simply not the case here. The Discussion Document was not used as agency policy or guidance, and it

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[10] In the Response to Comments, the Region stated that no commenter raised concerns about the area of review or aquifer exemption boundary. Revised Resp. to Cmts. at 3-4 (Cmt. #184). The Tribe argues that the Region's assertion is false and cites to various parts of the comments that they believe illustrate a challenge to these terms. 2025 Pet. at 15. The Board does not have jurisdiction to review challenges to aquifer exemption boundary determinations. *See, e.g.*, *In re Florence Copper, Inc.*, 17 E.A.D. 406, 419-20 (EAB 2017) (holding that the Board was not the proper forum to resolve aquifer exemption-related challenges because those decisions "are discrete final agency actions that are not part of UIC permitting decisions, are separately operable from any UIC permit, and are subject to challenge in a different forum under the SDWA."), *pet. for review vol. dismissed sub nom. Town of Florence v. EPA*, No. 17-73168 (9th Cir. Aug. 8, 2018). Additionally, based on our review of the record, we agree with the Region, that "the cited materials do not include any comments about the appropriateness of the [area of review]." 2025 Reg.'s Resp. Br. at 29. The Region determined that the fixed radius method described under 40 C.F.R. § 146.6(b) was the appropriate method for designating the area of review for the Dewey-Burdock project. 2019 Fact Sheet at 30 (explaining why the zone of endangering influence calculation is not appropriate for Class III injection wellfields). While the comments cited in the petition relate to *features* within the area of review, it does not raise concerns with the appropriateness of the method selected to determine the area of review itself. *See* 2025 Pet. at 15 (citing materials). In any event, the petition did not challenge the Region's determination to use the fixed radius method to delineate the area of review, and the regulations afford the Region discretion to make this determination.

did not serve as the basis for the permitting decision. Rather, the Discussion Document provided the Region's explanation to Powertech of the type of site- specific information that would be required under existing regulations for the type of permit for which Powertech was preparing to apply. Revised Resp. to Cmts. at 2-3 (Cmt. #184).

In sum, the document identified by the Tribe as constituting de facto rulemaking is based on and consistent with existing regulatory requirements and does not set forth any new or additional requirements that have a binding effect. Nor does the Region rely on the document as a basis for its decisions. As such, the Tribe has not demonstrated that the Region engaged in de facto rulemaking contrary to the APA in the context of issuing the Powertech UIC permits.

C. *The Tribe Has Not Demonstrated that the Region Clearly Erred Under the SDWA and Its Implementing Regulations*

The Tribe's 2020 petition argues that the Region failed to comply with the SDWA and its implementing regulations at 40 C.F.R. §§ 144.12, .33(c)(3) and 40 C.F.R. §§ 146.6(a)(ii), .33(a) "regarding demonstration of ability to contain the mining fluid within the exempted aquifer and protect underground sources of drinking water." 2020 Pet. at 8-9, 25, 35-36, 38, 41-42; *see also* 2025 Pet. at 25-26 (incorporating by reference the Tribe's arguments in the 2020 petition regarding the preserved SDWA issues). In particular, the Tribe questions the sufficiency of the baseline groundwater data, the hydrogeological data and analysis, and the cumulative effects analysis that underlie the permit decisions. *See* 2020 Pet. at 23- 33 (challenges to cumulative effects analysis); *id*. at 35-38 (challenges to baseline groundwater quality); *id*. at 38-45 (challenges to hydrogeological data and analysis). In the Tribe's view, the data and analyses that form the bases of the Region's permit decisions are insufficient to demonstrate the containment of mining fluid as is required under the UIC regulations.

As explained more fully below, the Tribe has not demonstrated that the Region clearly erred under the SDWA. We begin our analysis of these issues by examining the Tribe's challenges to the baseline data and hydrogeological analysis, followed by the challenges to the cumulative effects analysis.

1. *Challenges to the Sufficiency of the Baseline Data and Hydrogeological Analysis that Underlie the Permit Decisions*

The Tribe contends that the Region relied on inadequate baseline groundwater quality data and inadequate hydrogeological data and analysis in

making its permit decision in violation of § 144.12(a).[11] *See* 2020 Pet. at 38, 42. It argues that the baseline groundwater data Powertech provided, and the Region relied on, is incomplete, and the Region's "analysis fails to provide sufficient information regarding the hydrologic and geological setting of the area to enable it to assess cumulative impacts or determine whether the proposed activities will impact an USDW." *Id.* at 35-36; 38-39.

At the heart of the Tribe's arguments are two misconceptions: (1) that in order for the Region to assess, and a permit applicant to demonstrate, that injection activities will not cause fluid to migrate into adjacent USDWs, all the baseline groundwater quality data and hydrogeological data need to be provided at the permit application stage and prior to permit issuance; and (2) that requiring site-specific data to be collected post-permit issuance deprives the public, the parties and the permitting authority "the opportunity to meaningfully review and evaluate the impacts from the proposed project during the permitting process." *Id*. at 36-39; *see also id.* at 42 (claiming that "[d]eferring the collection and review of critical, and admittedly necessary, information until after the permits are issued show that the 'applicant' has not satisfied its burden in 40 [C.F.R.] § 144.12(a) and not provided sufficient information for EPA to lawfully discharge its cumulative effects analysis obligations in 40 [C.F.R.] § 144.33(c)(3) in violation of the SDWA and

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[11] In addition to citing 40 C.F.R. § 144.12(a) in support of its contention that neither Powertech nor the Region can demonstrate the "ability to contain the mining fluid within the exempted aquifer and to protect underground sources of drinking water," the Tribe briefly references 40 C.F.R. §§ 146.6(a)(ii) and 146.33(a). 2025 Pet. at 2. The 2025 petition appears to be the first place where the Tribe relies on the latter two provisions, and the Tribe does not identify where these provisions were previously raised as 40 C.F.R. § 124.19(a)(4)(ii) requires. *See City of Lowell*, 18 E.A.D. at 136-37.

Setting aside whether this portion of the Tribe's argument was properly preserved, we note that the Tribe's reliance on these provisions is misplaced. Section 146.6(a)(ii) forms part of the regulation that describes how to determine the area of review by using the "zone of endangering influence" method, which as we explained the Region determined was not appropriate here, and the Tribe has not articulated a specific challenge to the Region's choice of method for delineating the area of review. *See* note 10, above. For its part, § 146.33(a) establishes operating requirements. As explained later in this decision, rather than supporting the Tribe's contention, this provision confirms that a well's ability to prevent fluid migration into USDWs is to be assessed on an ongoing basis, during the different stages of injection. *See* Part V.C.1.a, below; 40 C.F.R. § 146.33(a) (establishing injection pressure requirement applicable during operation).

UIC regulations."). The Tribe's argument is inconsistent with the design of the UIC permitting program.

a. *The UIC Permitting Program*

UIC permits are, by design, multi-phased permits with three main phases that can be described as: (1) pre-operation (which includes construction and testing), (2) operation, and (3) plugging and abandonment. *See Powertech I*, 19 E.A.D. at 28 n.4; Water Programs; Consolidated Permit Regulations and Technical Criteria and Standards, 45 Fed. Reg. 42,472, 42,478 (June 24, 1980) (describing the UIC permitting sequence); *see generally* 40 C.F.R. pt. 144 (establishing general requirements for the UIC program that includes delineation of the permitting processes, application requirements, criteria for permit issuance, and conditions for formation testing, operation, and closure). Each of these phases allow for ongoing evaluation, feedback, and adaptation to ensure effective protection of USDWs. *See, e.g.*, 40 C.F.R. §§ 144.31 (detailing information permit applicants must submit that may be subject to review or revision based on feedback from permitting authority), 144.39 (allowing for permit modification), 146.8 (requiring regular testing and monitoring of well integrity); *see also* 45 Fed. Reg. at 42,478 (explaining that one of the benefits of a multi-phased permit is greater environmental protection by clarifying the permit issuer's authority to supervise the construction and testing, as well as the operation and abandonment).

The prohibition in § 144.12(a) seeks to protect USDWs from injection activities throughout each of the UIC permitting phases and places the burden of showing compliance with this requirement on the UIC permit applicant. It states in relevant part: "No owner or operator shall *construct, operate, maintain, convert, plug, abandon, or conduct* any other injection activity in a manner that allows" contamination into USDWs. 40 C.F.R. § 144.12(a) (emphasis added). This provision ensures that operators implement proper construction, operation, and monitoring practices to prevent fluid migration.

The UIC permitting program is set up so that the permit applicant provides the permit issuer with certain information, and complies with requirements, throughout each of the permitting phases and over the lifetime of the injection activity. *See, e.g.*, 40 C.F.R. § 144.51 (identifying requirements for all permits, including conditions that apply prior to commencing injection, during operation, and thereafter). Under this permitting scheme, the injection well's ability to contain injection fluid and prevent migration into USDWs is assessed on an ongoing basis, not at one particular phase, and does not require a demonstration for all phases prior to granting a permit.

Of relevance here is the pre-operation phase which starts with the permit application process, followed by permit issuance, drilling, construction, and testing. At the permit application stage for Class III wells, the permit applicant submits, among other things, a proposed formation testing program, which the permit issuer must consider prior to issuing a permit.[12] 40 C.F.R. § 146.34(a)(8). Once a Class III permit has been issued, a permit holder may drill, construct, and test injection wells, in accordance with the terms of its permit. *See, e.g.*, 40 C.F.R. § 146.32(b) (describing logs and tests to be conducted during drilling and construction on new Class III wells). For Class III wells, formation testing, which includes obtaining the physical and chemical characteristics of the formation fluids, takes place at the next stage after the test injection wells are constructed. *See id*. §§ 146.32(c)(3), .34(a)(8), (b)(1), (4). Once formation testing is completed, the permit issuer examines the results, and any other information it deems appropriate, to determine whether it should grant authorization to operate.[13] *See id.* §§ 146.32(b), .34(b)(1), (4). Contrary to the Tribe's assertion, a Class III permit applicant need not submit full formation data at the permit application stage, and data collection post-permit issuance comports with the UIC program's design.[14]

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[12] Section 146.34(a) lists other information the permit issuer must consider *prior to issuing a permit*. 40 C.F.R. § 146.34(a)(1)-(16). Additional information a permit applicant must submit with its permit application includes a map "extending one mile beyond the property boundaries of the source depicting the facility and each of its intake and discharge structures; each of its hazardous waste treatment, storage, or disposal facilities; each well where fluids from the facility are injected underground; and those wells, springs, and other surface water bodies, and drinking water wells listed in public records or otherwise known to the applicant within a quarter mile of the facility property boundary." *Id*. § 144.31(e)(7).

[13] Section 146.34(b) lists the information the permit issuer must consider *before granting authorization to operate*. 40 C.F.R. § 146.34(b)(1)-(6).

[14] The discussion in the text above references requirements for Class III wells. The UIC regulations do not include specific criteria and standards for Class V wells, which generally authorize injection of *non-hazardous* fluids underground. 40 C.F.R. § 146.51. UIC regulations instead provide the Region with the discretion to determine the permit requirements. *See, e.g.*, 40 C.F.R. §§ 144.12(c)-(d), .33(b)(2). Here, the Region followed a phased approach in the UIC regulation for both the Class III and Class V permits and both permits require Powertech to report the results of formation water quality testing in the Injection Authorization Data Package Reports before obtaining authorization from EPA

With this as background, we now consider the Tribe's challenges to the sufficiency of the baseline groundwater quality data and the hydrogeological data and analysis.

b. *The Tribe Has Not Demonstrated Clear Error in the Region's Reliance on the Baseline Data or Hydrogeological Analysis*

In support of its claims that the baseline groundwater quality and hydrogeologic data for these permits are incomplete, and the hydrogeological analysis does not provide "sufficient information regarding the hydrologic and geological setting of the area" the Tribe recites arguments and expert testimony it submitted during the public comment period. *Compare* 2020 Pet. at 35-45 *with* Tribe's Comments on 2017 Draft Permits at 22-30. The arguments and expert testimony it recites were originally developed for, and presented during, the NRC's license proceedings for the Dewey Burdock project.[15] *See* Tribe's Comments on 2017 Draft Permits at 22-30. For example, the 2020 petition argues that "[a]t the NRC licensing hearing Dr. Moran's testimony confirmed that additional data is necessary for a 'complete' baseline analysis, including the collection of data for water quality constituents not presented in [Powertech's] application materials, such as strontium and lithium." 2020 Pet. at 37. The Tribe also cites responses the Region provided in its response to comments document and argues that they "confirm[] the need for additional data in order to determine" compliance with the SDWA. *Id.* at 38; *see also id*. at 37, 41. The Tribe's assertion that the data supporting the Region's decision was insufficient lacks merit.

As explained in detail below, on appeal the Tribe repeats comments that the Region addressed in its response to comments document but the Tribe neither confronts the Region's responses, nor grapples with the regulatory provisions the Region followed. Additionally, the arguments the Tribe submits in support of its contentions are unsupported by the record and the applicable UIC regulations.

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to commence injection. *See* Final Class III Permit, pt. II.H at 18-20 (A.R. 1150); Final Class V Permit, pt. II.E at 11 (A.R. 1151).

[15] In *Oglala Sioux Tribe v. U.S. Nuclear Regulatory Commission*, 45 F.4th 291 (D.C. Cir. 2022), the Tribe challenged the baseline water quality data Powertech provided to the NRC, which is the same baseline water quality data it provided to the Region. The Tribe also challenged the NRC's analysis of the hydrogeologic data. *Id*. at 302. The main focus of the Tribe's arguments was on the NRC's approach of post-licensing data collection. *Id*. The D.C. Circuit Court of Appeals ruled against the Tribe. *Id.* at 303.

Based on our review of this issue, the Region adequately explained its rationale and supported its reasoning in the administrative record. Our detailed analysis follows.

(i) *The Baseline Groundwater Data*

In its response to comments, the Region addressed questions and concerns about the baseline groundwater data Powertech submitted, responded to comments that advocated for additional baseline groundwater data analysis, including on "strontium, tritium, and lithium," and responded to objections to the collection of additional data after permit issuance, rather than before. *See* Resp. to Cmts. at 103, 123-24 (Cmts. #4, 20-21). The Region explained that the data Powertech provided met the requirements of the UIC regulations, as the regulations require EPA to consider the information listed in 40 C.F.R. § 146.34(a) *prior to issuance of a permit*, and that information does not include a full characterization of the geology and groundwater. *Id*. at 103 (Cmt. #4) (emphasis added).[16]

The Region clarified that the Class III permit application included analysis for strontium, but that lithium and tritium were not included in the Class III permit "because there are no primary drinking water standards [for such substances] and no identified human health impacts for them." *Id*. at 123-24 (Cmt. #21). With respect to the collection of water quality data after permit issuance, the Region explained that this approach is consistent with the UIC regulations for Class III wells. *Id*. at 123 (Cmt. #20) (citing 40 C.F.R. §§ 146.32(c)(3), .34(a)(8)). Prior to permit issuance, the regulation requires the Region to review "the *proposed* formation testing program" to obtain the information required by § 146.32 for construction authorization. *Id.*; *see also* 40 C.F.R. § 146.32(c)(3) (requiring the applicant to submit "physical and chemical characteristics of the formation fluids" where the injection zone is naturally water-bearing). It added that the Class III area permit contains conditions for formation water quality testing, that the Permittee is required to report on the results of the formation water quality testing in the Injection Authorization Data Package Reports before obtaining authorization to commence injection, and that—pursuant to 40 C.F.R. § 146.34(b)(1)—following construction of the wells but before granting approval for operation, the Region will consider "all available logging and testing data on the well." Resp. to Cmts. at 123 (Cmt. #20) (citing 40 C.F.R. § 146.34(b)(1)); *see* Region 8, U.S. EPA, *Underground Injection Control Final Class III Area Permit, Area Permit No.*

[16] As already explained, the UIC regulatory scheme contemplates that the permit applicant will conduct formation testing after permit issuance but before approval to operate. 40 C.F.R. § 146.34(a), (b).

SD31231-00000 pt. II.H at 18-20 (Mar. 2025) (A.R. 1150) ("Final Class III Permit"); Region 8, U.S. EPA, *Underground Injection Control Final Class V Area Permit, Area Permit No. SD52173-00000* pt. II.A at 3-4 (Mar. 2025) (A.R. 1151) ("Final Class V Permit").

The Region further explained that if it "determines that the results of the testing do not confirm the information on which the permits are based, [it] will, as appropriate, require additional testing or modify the permit" and that "[i]f major modifications to the permits are warranted based on these new water quality data, EPA will modify the permits (along with all supporting data) and open those modifications for public comment." Resp. to Cmts. at 123 (Cmt. #20). Further, the Region committed "to posting the Injection Authorization Data Package Reports" and its authorization to inject approval on the Region 8 UIC Program website. *Id*.

The Tribe does not address these responses. Instead, it argues without legal support, that the information Powertech provided "omits the required quantitative description of the chemical and radiological characteristics of [the aquifers] necessary to meet its burdens," 2020 Pet. at 38; cites statements from the response to comments where the Region acknowledges the need for additional site-specific water quality data, *id*. at 37-38; and claims, based on testimony provided during the NRC licensing process, that any assertion by the Region that additional groundwater "data cannot be obtained without full construction of final well-fields is unsupported," *id*. at 37. In so arguing, the Tribe takes the Region's responses out of context and ignores the fact that data collection post-permit issuance is wholly consistent with the multi-phased process set forth in the UIC regulations,[17] and is the approach the Agency has followed in other UIC permits. *See, e.g.*, *In re Am. Soda, LLP*, 9 E.A.D. 280, 296 (EAB 2000); *In re Envotech, L.P.*, 6 E.A.D. 260, 284 (EAB 1996).

Here, the Region determined the data it had was sufficient under the UIC regulations for this phase of the permitting process. Its rationale was adequately explained and supported in the record. For this reason, we defer to the Region's technical judgment. As the Board has stated in other UIC matters, deferring to the Region's technical expertise is particularly appropriate where, like here, the permit issuer "is only authorizing the permittee to drill, construct, and test the wells" and "will analyze detailed site-specific data gathered during drilling, construction, and

[17] To the extent the Tribe is attempting to challenge the UIC regulations, this proceeding is not the appropriate forum for a challenge to Agency regulations. *See* note 9, above (citing cases).

testing," unless "obvious flaws" in the permit issuer's analysis are present. *Envotech*, 6 E.A.D. at 284; *accord Beeland Grp.*, 14 E.A.D. at 196; *see also Am. Soda*, 9 E.A.D. at 296 (upholding Class III area permit that included permit conditions requiring further characterization of the groundwater post-permit issuance).

(ii) *The Hydrogeological Baseline Data and Analysis*

In its response to comments the Region also addressed questions and concerns about the site's hydrogeology and the potential for hydraulic communications between aquifers in the area. Resp. to Cmts. at 101-02, 104-08, 110-11 (Cmts. #2, 4, 8). The Region stated that the baseline geologic and hydrogeologic analysis was adequate under 40 C.F.R. § 146.34(a) and provided a thorough explanation as to why requiring a full geologic and hydrogeologic characterization of each wellfield after permit issuance, but before approval of injection activities, is consistent with the UIC regulations and why the permits are protective of adjacent USDWs and surface water in the area. *See id*. Further, the Region directed commenters to sections 3 and 4 of the Fact Sheet, which summarizes the Region's evaluation of the baseline geological and hydrogeological analysis provided in the Class III Permit applications, including the adequacy of confining zones. The Region also provided a list of all the information it reviewed as part of its analysis and observed that it had evaluated the potential presence of "breccia pipes," "fractures and joints," and the Dewey Fault in the project area. *Id*. at 103-08 (Cmt. #4); *see also id*. at 110-111 (Cmt. #8). It concluded that while additional physical surveys are needed to analyze the ability to contain mining fluid and properly identify potential impacts to groundwater resources, the baseline geologic and hydrogeologic data are adequate under the UIC regulations to proceed with issuing the permit for this phase of the project. *Id*. at 103-08 (Cmt. #4). With respect to boreholes in particular, the Region noted that it "is aware of the existence of leaky historic drillholes (also referred to as 'boreholes' by other commenters) in the project area," and that "the Class III Area Permit contains many provisions that address this issue so that they will not cause an endangerment to" USDWs. *Id*. at 118 (Cmt. #13). It also explained that "[t]he UIC regulations do not require that the boreholes be plugged prior to issuance of a permit," and that while the "regulations require an applicant to provide a map that includes abandoned wells and dry holes, * * * only information of public record and which is known to the applicant must be included." *Id*. (Cmt. #14) (citing 40 C.F.R. § 146.34(a)(2)).

Rather than acknowledging and addressing the Region's responses to comments, the Tribe argues that "Powertech's submittals and EPA permit documents provide no information on the location of leaking boreholes," 2020 Pet.

at 41, that the hydrogeological analysis "failed to account for faults and fractures in the geology at the site," *id.* at 42, and that at an NRC hearing Powertech confirmed that it had "withheld significant data regarding bore holes at the proposed mine site" that the Region is required to review under 40 C.F.R. § 146.34(a)(2), (3), *id*. at 44. *See also* Reply to Region 8 and Powertech Responses to [2020] Petition for Review at 19 (Jan. 22, 2024) ("2020 Reply Br."). In so arguing, the Tribe simply repeats comments provided during the public comment period and does not demonstrate clear error. *See, e.g.*, 2020 Pet. at 38-40; Tribe's Comments on 2017 Draft Permits at 24-28.[18]

The Tribe's argument is also misplaced because it is premised on information developed for proceedings that took place before a different agency with different regulatory requirements and is based on the erroneous assumption that a UIC permit applicant must submit exhaustive information to the permit issuer

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[18] In an attempt to repackage its hydrogeological analysis and baseline data claim the Tribe argued in its 2020 reply brief that the Region's response to the 2020 petition misconstrued the Tribe's argument as requiring that "all" hydrogeological information must be provided and analyzed before permitting. 2020 Reply Br. at 18. It claims its argument is that the Region did not rely on "*available* site-specific data" and expert testimony offered during comments. *Id*. at 18-19. But the argument that the Region did not rely on "*available* site-specific data" is a new argument and cannot be raised for the first time in a reply brief. 40 C.F.R. § 124.19(c)(2); *see Powertech I*, 19 E.A.D. at 35. The 2020 petition's focus was on the alleged lack of sufficient information regarding the hydrologic and geological setting and the post-permit issuance data collection approach, not the Region's alleged failure to rely on "available site-specific data." *See, e.g.*, 2020 Pet. at 38-39, 41.

Setting aside the Tribe's attempt to raise a new argument in its 2020 reply brief, the record shows that the Region considered a wide range of information as part of its hydrogeological analysis that included, among other things, information gathered from thousands of drillholes and information about the potential for the presence of "breccia pipes" and fractures in the project area. 2019 Fact Sheet at 17 (noting "[t]he geological information within the Dewey-Burdock Project Area was compiled from the interpretation of data gathered from thousands of exploration drillholes (5,932 exploration drillholes are included in Appendix C of the Class III Permit Application) located throughout the Dewey-Burdock Project Area"); *id*. at 30 (explaining that inventory of wells within the area of review included a search of historical records and field investigations); *see also* Resp. to Cmts. at 103-08 (Cmt. #4) (describing information examined as part of its baseline geologic and hydrologic analysis).

prior to permit issuance. The UIC regulations require that the applicant supply preliminary hydrogeologic information prior to permit issuance and that only information of public record and pertinent information known to the applicant needs to be submitted to the agency at this stage. *See* 40 C.F.R. §§ 144.31(e), 146.32(c)(3), 146.34(a)(2)-(3), (8), (b)(1), (4). As already explained, the UIC permitting scheme allows in-depth data collection to be conducted after permit issuance and before approval to operate.

The Region's conclusion that Powertech complied with 40 C.F.R. § 146.34(a)(2) and (a)(3) involved technical decisions for which we afford substantial deference to the Region. *Envotech*, 6 E.A.D. at 284 (noting that petitioners who challenge a Region's technical decision carry a significant burden to demonstrate clear error and finding no clear error in the Agency's approach to allowing fuller assessment of the geological setting of the site after drilling). Clear error in a permit issuer's technical determination "is not established simply because petitioners document a difference of opinion or an alternative theory." *NE Hub Partners*, 7 E.A.D. at 567. The record adequately explains the Region's rationale for accepting the hydrogeological data Powertech provided and documents the Region's examination of the geological and hydrological analysis it conducted prior to permit issuance. As such, the Tribe has not demonstrated that the Region's technical judgment is clearly erroneous.

2. *Challenges to the Region's Cumulative Effects Analysis*

The Tribe also challenges the adequacy of the cumulative effects analysis the Region conducted under 40 C.F.R. § 144.33. In the Tribe's view, the scope of the Region's analysis should have been broader, and the Region did not properly analyze all foreseeable impacts of the project, including to groundwater, air, wildlife, and cultural resources. *See, e.g.*, 2020 Pet. at 25-26 (asserting the Region's cumulative effects analysis insufficiently considered impacts to groundwater, air, wildlife and cultural resources and failed to "account for all foreseeable cumulative effects of the project"); 2025 Pet. at 25-26. As explained below, the Tribe has not demonstrated the Region clearly erred in analyzing the cumulative effects of the project.

a. *The UIC's Requirement to Consider Cumulative Effects and the Scope of the Region's Analysis*

The boundaries of the UIC program are limited to the protection of underground sources of drinking water. *See In re Sammy-Mar, LLC*, 17 E.A.D. 88, 98 (EAB 2016) (noting that the UIC permitting process "is narrow in its focus" and its boundaries are "limited to the protection of underground sources of drinking

water"); *In re Bear Lake Props*., 15 E.A.D. 630, 643-44 (EAB 2012) (same). It is through this lens that we review UIC permit challenges. *See In re Panoche Energy Ctr.*, 18 E.A.D. 818, 852 (EAB 2023) (observing that the Board's review of the UIC permit decisions extends only to the boundaries of the UIC permitting program).

Here the Tribe questions the Region's compliance with § 144.33(c)(3). This provision requires the Agency, in evaluating an area permit application, to consider "[t]he cumulative effects of drilling and operation of additional injection wells." 40 C.F.R. § 144.33(c)(3). This provision does not prescribe the manner in which the Agency is to consider these cumulative effects, nor does it delimit the scope of the analysis the Agency is to undertake, thus affording the Region discretion to determine the form, breadth, and reach of its analysis. Determining the scope and content of a cumulative effects analysis involves making technical judgments that are often fact and context-specific and driven by policy considerations. On these types of determinations, we afford the Region a great deal of deference. *See NE Hub Partners*, 7 E.A.D. at 567-68; *In re City of Keene*, 18 E.A.D. 720, 724 (EAB 2022).

Exercising the discretion afforded, the scope of the Region's cumulative effects analysis focused on "potential *environmental effects at or near the project site that occur close in time* with the drilling and operation of the injection wells." Resp. to Cmts. at 271 (Cmt. #238) (emphasis added). This scope is consistent with § 144.33(c)(3)'s requirement to consider "the cumulative effects of drilling and operation of additional injection wells" in the area of review, and the narrow focus of the UIC program (i.e., USDW protection).

The Tribe's reading of § 144.33(c)(3) is predicated not on the SDWA or UIC regulations, but on the Tribe's conflation of UIC and NEPA requirements and the Tribe's misinterpretation of the functional equivalence doctrine. *See* 2020 Pet. at 25-31 (challenging the Region's cumulative effects analysis under the heading "NEPA's Cumulative Impacts Mandate is Not Satisfied"); 2020 Reply Br. at 10 (alleging that the Region's permitting process failed to achieve functional equivalence to NEPA's duties.) Our decision in *Powertech I* made clear that the SDWA and the UIC permitting program are the functional equivalent of NEPA, and that the EPA regulations exempt UIC permits from the procedural requirements of NEPA. *Powertech I*, 19 E.A.D. at 37, 40 n.13. As such, the Region's cumulative effects analysis should be analyzed under the UIC regulations, not NEPA. *Id.* Yet, the post-remand petition continues to rely on NEPA. *See* 2025 Pet. at 3 (adopting the arguments on pages 25-31 of the 2020 petition in support of claim that the Region failed to comply with the cumulative effects analysis required under

40 C.F.R. § 144.33(c)(3)). Again, NEPA does not apply to the case at hand.[19] *Powertech I*, 19. E.A.D. at 40-42.

b. *The Tribe Has Not Demonstrated Clear Error in the Cumulative Effects Analysis the Region Conducted*

The Region conducted an extensive cumulative effects analysis under the UIC regulations for the Dewey Burdock project. *See* Region 8, U.S. EPA, *UIC Program Cumulative Effects Analysis for the Dewey-Burdock Uranium In-Situ Recovery Project* at 1-2 (Nov. 2020) (A.R. 367) ("CEA"). The 172-page analysis considered a wide range of potential impacts from the drilling and operation of the proposed injection wells on the various media (e.g., surface water, groundwater, air, and soil) within the project's area of review[20] that included: (1) impacts to

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[19] It is worth noting that even though NEPA does not apply to the UIC permits at issue here, the Region's approach under the UIC's cumulative effect provision aligns with what NEPA requires. *Cf. Seven Cty. Infrastructure Coal. v. Eagle Cty. Colo.*, 145 S. Ct. 1497, 1515-16 (2025) (NEPA does not require agencies to consider in an environmental impact statement "other future or geographically separate projects that may be built (or expanded) as a result of or in the wake of the immediate project under consideration," or the potential impacts of separate upstream and downstream projects that are separate in time or place from the project at issue).

The Tribe references the *Seven County* Supreme Court decision, for the proposition that the Region needed to consider potential project expansions. 2025 Reply Br. at 13-14. Even if the *Seven County* decision applied here, which it does not, the decision does not support the Tribe's contention. In *Seven County* the Supreme Court held that the focus of NEPA is "the project at hand," not other future or geographically separate projects. *Seven Cty.*, 145 S. Ct. at 1516 (2025). The project here consists of the construction and operation of injection wells in fourteen wellfields and up to four deep injection wells within the permit area. Final Class III Permit pt. I.B. at 1; Final Class V Permit pt. I at 1. Any proposed or future expansions Powertech may be considering are not part of the project at hand. As the Region, Powertech, and our November 2023 order have stated, "if Powertech chooses to modify the project in the future beyond the scope of the issued permits, it will have to seek a permit modification in accordance with 40 C.F.R. § 144.39, and submit an updated application or additional information as appropriate." *See, e.g.*, 2023 Order at 15.

[20] The area of review for the UIC permits at issue here consisted of the Dewey-Burdock project area plus a buffer zone of one point two (1.2) miles outside the Project Area boundary, 2019 Fact Sheet at 30, well beyond the quarter of a mile buffer zone referenced in 40 C.F.R. §§ 144.3, 146.6(b). For cumulative impacts to air, the Region

USDWs (such as groundwater consumption, water level drawdown in nearby water supply wells, groundwater quality impacts, and potential for subsidence), *id*. at 6- 41; (2) impacts to surface waters and wetlands where the project area lies, *id*. at 42-65; (3) impacts from spills and leaks that could potentially occur at pipelines, wellfields, processing facilities, and deep well pump houses, *id*. at 67-79; (4) impacts from transportation, accidents, and releases from treatment, storage and waste management, *id*. at 144-57, 162-71; (5) impacts to land use and soil in the area of review, *id*. at 80-92; and (6) impacts to the geology, ecological resources, and air quality in the area of review, *id*. at 92-144, 157-62. For each potential environmental impact the Region's cumulative effects analysis identified, the Region included corrective and/or mitigation measures to reduce such impacts. *Id*. at 5. The Region concluded that "the cumulative effects of the drilling and operation of the injection wells under the UIC Area Permits [would be] acceptable if Powertech implements the applicable prevention, mitigation, remediation, reclamation or restoration procedures identified for each type of impact discussed" in the cumulative effects analysis. *Id.* at 4. It added that "[i]f Powertech does not implement the * * * procedures identified for each type of impact * * * and the result is that environmental concerns resulting from the impact are no longer acceptable, the UIC Director may decide to modify" the permits. *Id*.

As mentioned above, the Tribe contends that the Region's cumulative effects analysis is defective because it does not consider cultural resources and all the foreseeable cumulative effects of the project, and lacks "competent" consideration of impacts to groundwater, air, and wildlife. *See* 2025 Pet. at 25-26; 2020 Pet. at 25-26. We now turn to these arguments.

(i) *The Region's Cumulative Effects Analysis Need Not Include Impacts to Cultural Resources*

The Tribe contends that the Region's cumulative effects analysis is defective because it does not include impacts from drilling and operation of additional injection wells on cultural resources. Nothing in § 144.33(c)(3) mandates the Region to include in its cumulative effects analysis impacts on non-environmental resources, such as cultural resources that may be present in the project area. In any case, and contrary to the Tribe's suggestion, the Region here considered the impacts of the project on Tribal cultural resources, albeit not in the cumulative effects document. The Region's response to comments explained why

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extended its analysis to twenty miles beyond the Dewey-Burdock Project Area Boundary. CEA at 1.

the cumulative effects analysis does not capture impacts on Tribal cultural resources and identified and addressed cultural resources-related concerns raised by commenters, including cultural interest in aquifers and other water bodies. Resp. to Cmts. at 344-45 (Cmt. #297). The Region also considered, among other things, Tribal spiritual and cultural interests in the Black Hills. *Id*. at 261 (Cmt. #230), 266 (Cmt. #235).[21] Accordingly, the Tribe has not demonstrated that the Region clearly erred in its cumulative effects analysis by not including impacts to cultural resources.

(ii) *The Region's Cumulative Effects Analysis Need Not Include All Foreseeable Effects of the Project*

We also reject the contention that the Region's cumulative effects analysis is defective because it does not account for all foreseeable effects of the project, including the effects of other mines/projects in the region, potential expansions of the Dewey Burdock project,[22] storage and radon emissions, and radioactive byproduct waste transportation and disposal to White Mesa Mill. *See* 2020 Pet. at 25-31. As noted above, the Agency has discretion to determine the reach of a cumulative effects analysis, which includes delineating the geographical and temporal boundaries of the analysis. The potential impacts the Tribe claims the Region needed to include in its cumulative effects analysis involve projects separate in time and place from the project at hand, and outside the scope of the Region's analysis. Accordingly, the Tribe has not demonstrated that the Region clearly erred

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[21] The Tribe does not explain why the Region's response to comments pertaining to its approach to cultural resources amounts to clear error. In particular, the Tribe does not address the reasons the Region provided for why its cumulative effects analysis does not include discussion of cultural resources and does not acknowledge that the Region considered cultural resources outside the context of the cumulative effects analysis. This failure to address the Region's response to comments is also grounds for denial of review. *See, e.g.*, *City of Keene*, 18 E.A.D. at 753.

[22] In support of the argument that the Region failed to consider expansions of the project, the 2025 petition cites three documents that the Board rejected in its November 2023 Order and introduces a new document to demonstrate alleged changes in the project that the Region's cumulative effects analysis did not consider. 2025 Pet. at 26-27; 2023 Order at 16-19. For the same reasons provided in our November 2023 Order, we do not consider the three documents previously rejected or the fourth post-decisional document now proffered. 2023 Order at 16-19. Given the scope of the Region's cumulative effects analysis, which we affirm above, *see* Part V.C.2.a, these documents would not alter our analysis of this issue in any event.

by not including all foreseeable effects of the project in its cumulative effects analysis.[23]

(iii) *The Tribe's Groundwater Arguments Fail on Procedural Grounds*

Regarding groundwater, the Tribe asserts that the Region "failed to consider and evaluate * * * groundwater quantity effects in the impacted area," and that the Region's cumulative effects analysis lacks a competent analysis of impacted environmental resources, including groundwater. 2020 Pet. at 25. As explained below, these assertions fail.

(a) *The Tribe's Groundwater Quantity Argument Lacks Requisite Specificity*

The Tribe's assertion that that the Region failed to consider and evaluate groundwater quantity effects in the impacted area lacks requisite specificity. The regulations that govern permit appeals state that "a petition for review must identify the contested permit condition or other specific challenge to the permit decision and *clearly set forth, with legal and factual support, petitioner's contentions for why the permit decision should be reviewed*." 40 C.F.R. § 124.19(a)(4)(i) (emphasis added). The petition does not satisfy this provision.

Here, the Region's cumulative effects analysis included consideration of groundwater consumption from nearby aquifers and water level drawdown in nearby water supply wells. *See* CEA at 6-19 (Section 3). With respect to Powertech's proposed consumptive use of water from the nearby aquifers, and water level drawdown, the Region concluded that the "amount of drawdown will not affect availability of groundwater to well owners outside the Project Boundary." *Id*. at 6, 12. The petition does not explain which aspects of the groundwater quantity analysis the cumulative effects analysis fails to "consider and evaluate," nor does it identify which part of that analysis is clearly erroneous or warrants review. *See* 2020 Pet. at 25. Absent a specific challenge to the Region's groundwater quantity analysis, the Tribe has not met its burden under 40 C.F.R. § 124.19(a)(4)(i), and the

[23] Again, if in the future Powertech were to expand or alter the project beyond the scope of the issued permits, it will have to seek a permit modification in accordance with 40 C.F.R. § 144.39 and submit an updated application or additional information as appropriate. *See, e.g*., 2023 Order at 15.

Board has no reason to second-guess the adequacy of the Region's cumulative effects analysis with respect to groundwater quantity. *See Beeland Grp.*, 14 E.A.D. at 205 (declining "to speculate as to which factual findings and legal conclusions" the petitioner contended were "clearly erroneous due to allegedly inadequate analyses," and noting that the lack of requisite specificity in petition is fatal to petitioner's arguments); *In re City of Moscow*, 10 E.A.D. 135, 172 (EAB 2001) (rejecting vague and unsubstantiated claims).[24]

(b) *The Tribe's Groundwater Quality Argument Does Not Address the Region's Response to Comments*

The Tribe's assertion that the Region failed to properly analyze the projects' impact on groundwater quality also fails to address the Region's response to comments on this point. Section 124.19(a)(4)(ii) requires, in part, that if the petition raises an issue that the Region addressed in the response to comments document, petitioner must explain why the Region's response to the comment was clearly erroneous or otherwise warrants review. 40 C.F.R. § 124.19(a)(4)(ii). The petition does not satisfy this provision.

Here the Region responded to comments about the project's impact to groundwater quality and other aspects of the environment. Resp. to Cmts. at 235 (Cmt. #188). It explained that it "considered potential avenues of contamination to USDWs from the injection activity associated with the project and incorporated measures [into the permits] to address potential migration of contaminants into areas that may endanger USDWs." *Id*. The Region directed commenters to section 3 of the cumulative effects analysis for additional information on the potential impacts to groundwater and added that the "permit conditions prevent endangerment to USDWs by ensuring that injection well construction, operation and maintenance, monitoring, and wellfield closure are conducted in compliance with UIC regulations." *Id*. The cumulative effects analysis contains a lengthy section on potential groundwater quality impacts, *see* CEA at 6, 19-40, and the Class III area permit includes conditions for construction, operation, maintenance,

[24] We also observe that in responding to comments that raised concerns about the project's water use and its long-term impacts on the environment and the economy of the southwestern Black Hills, the Region explained that the cumulative effects analysis discusses the Region's consideration of the project's proposed uses of water and directed commenters to section 3 of the CEA. Resp. to Cmts. at 355 (Cmt. #311). The petitions fail to acknowledge this response.

monitoring, and wellfield closure, *see* Final Class III Permit pts. V-XI. Because the Tribe does not address the Region's response to comments or explain which aspects of the response or the cumulative effects analysis' discussion about potential impacts to groundwater quality are clearly erroneous or otherwise warrant review, the Tribe has failed to satisfy the threshold requirements for review under 40 C.F.R. § 124.19(a)(4)(ii). Accordingly, we are left with a record that supports the Region's approach. *In re Ariz. Pub. Serv. Co.*, 18 E.A.D. 245, 285 (EAB 2020), *appeal docketed sub nom. Dine' Citizens Against Ruining Env't v. EPA*, No. 21- 70139 (9th Cir. Jan. 22, 2021).

(iv) *The Tribe's Air and Wildlife Argument Is Not Preserved for Review and Lacks Specificity*

The Tribe's assertion that the Region failed to properly analyze impacts to air and wildlife fails on procedural grounds as it does not satisfy 40 C.F.R. § 124.19(a)(4)(ii) requirements. That provision also requires that petitioners "demonstrate, by providing specific citation to the administrative record, including the document name and page number, that each issue being raised in the petition was raised during the public comment period." 40 C.F.R. § 124.19(a)(4)(ii). The petition here does not provide a citation to where this challenge was raised during the public comment period. It is not incumbent upon the Board to scour the record to determine whether an issue was raised during the public comment period. *See, e.g.*, *In re City of Marlborough*, 12 E.A.D. 235, 240 (EAB 2005). The argument, therefore, is not preserved for Board review. *See City of Lowell*, 18 E.A.D. at 136- 37 (EAB 2020).

Even if the issue had been preserved, the argument in the petition lacks requisite specificity. The petition does not explain which aspects of the air and wildlife analysis the Region conducted are clearly erroneous or warrant review. Here, the Region prepared an extensive cumulative effects analysis that included consideration of the potential air and wildlife impacts associated with the project. CEA at 101-29 (impacts to air quality); *id*. at 51, 90, 152-53, 157-62 (wildlife). With respect to air, the Region expanded the boundary of investigation to 20 miles beyond the Dewey-Burdock Project Boundary, CEA at 1, and considered several sources of information in its analysis and mitigation measures, *id*. at 101. Absent a specific challenge to the Region's analysis, we are left with a record that supports the Region's approach. *Ariz. Pub. Serv. Co.*, 18 E.A.D. at 285; *see also In re Energy Answers Arecibo*, *LLC*, 16 E.A.D. 294, 363 (EAB 2014) ("Absent a specific challenge to the * * * data * * * used in assessing existing air quality, the Board has no basis to second-guess the Region's assessment."), *pet. for review dismissed as untimely sub nom. Sierra Club de P.R. v. EPA*, 815 F.3d 22 (D.C. Cir. 2016).

For all of the reasons above, the Board concludes that the Tribe has not met its burden to demonstrate that the Region clearly erred under the SDWA and its implementing regulations.

D. *The Region Has Met Its NHPA Section 106 Obligations*

Prior to remand, the Board held that the Region fully complied with the NHPA in considering the Dewey-Burdock UIC permits. In its November 2023 order, the Board denied review of the Tribe's NHPA section 106 claim, concluding that the Region had properly designated the NRC as the lead agency for NHPA section 106 compliance purposes and, because the D.C. Circuit had determined that the NRC had complied with NHPA section 106, the Board held that the Region too had satisfied its NHPA section 106 obligations. 2023 Order at 20-29. The Board next denied review of the Tribe's NHPA section 110 argument in its September 2024 order. *See Powertech I*, 19 E.A.D. at 31-37. There, the Board noted that the "Tribe's assertions about the adequacy of the Programmatic Agreement, the alleged lack of a competent cultural resources survey, and the Region's designation of the NRC as lead federal agency are nothing more than an attempt to relitigate the NHPA section 106 arguments that the Board [had] already rejected." *Id*. at 35-36. The Tribe now argues that the Region is out of compliance with NHPA section 106 because of changed circumstances. *See* 2025 Pet. at 19-24. We disagree.

As explained in the discussion below, the new NHPA section 106 issue is beyond the scope of the Board's September 2024 remand order and, in any event, the Tribe has failed to demonstrate that the Region clearly erred with respect to its NHPA section 106 obligations.

1. *The New NHPA Section 106 Issue Is Not Properly Before the Board*

The newly raised section 106 issue falls outside the scope of review of the Board's September 2024 remand order. The scope of "review of a revised permit following remand is limited to issues the Board remanded and any other changes made to the permit during the remand period." *Gen. Elec. Co.*, 18 E.A.D. at 664 (citing cases). A change to a permit condition is [t]he only exception to the limitation on the scope of review as established by the remand order" because "[the changed permit] conditions have not been previously subject to the appeal process." *In re Knauf Fiber Glass*, 9 E.A.D. 1, 7 (EAB 2000).

Here, the September 2024 Board's order expressly limited post-remand appeals "to the issues considered on remand and any modifications made to the permits as a result of the remand." *Powertech I*, 19 E.A.D. at 46 n.23. It also preserved specific issues relating to the SDWA and de facto rulemaking that the

Tribe could raise in a new petition if it sought review of the Region's action on remand. *Id.* On remand, the Region made no changes to the UIC permits. Accordingly, the scope of the Board's review in this appeal is limited to the remanded administrative record issue and the specifically preserved issues, all of which we have addressed above. *See Gen. Elec. Co.*, 18 E.A.D. at 664 (citing *Upper Blackstone*, 15 E.A.D. 297, 302 (EAB 2011) (explaining the rationale behind adhering to narrow review of appeals after remand)). It is important to adhere to the language of the Board's order regarding post-remand appeals to bring repose and finality to contested issues. *See id*. To do otherwise would provide petitioners endless opportunities to challenge a permit, contrary to the limitations set forth in 40 C.F.R. § 124.19. The Board therefore rejects the Tribe's new NHPA section 106 issue as outside the scope of review of the Board's 2024 remand order.

2. *The New Circumstances Identified Do Not Alter the Board's Prior Decision*

Even if the Board were to reach the merits of the new NHPA section 106 issue, it would deny review as the Tribe has not demonstrated clear error by the Region. The Tribe contends that "new circumstances demonstrate that the previous finding [of] the NRC's compliance with the NHPA is no longer supported," and therefore the Region is out of compliance with NHPA section 106. 2025 Pet. at 19.

As support, the Tribe first argues that "the NRC license for the proposed Dewey-Burdock project, upon which the NHPA compliance was based, has expired." *Id*. This is incorrect. As both the Region and Powertech noted, NRC regulations expressly provide that if a licensee files a renewal application within thirty days of the expiration of the license, that "existing license will not be deemed to have expired until the [renewal] application has been finally determined." 10 C.F.R. § 2.109(a). Here, the NRC issued a notice in the Federal Register acknowledging timely receipt of Powertech's license renewal application and explaining that the existing license "will not be deemed to have expired until the [renewal] application has been finally determined." Powertech (USA) Inc.; Dewey-Burdock In-Situ Uranium Recovery Facility; License Renewal Application, 89 Fed. Reg. 65,401, 65,402 (Aug. 9, 2024). Thus, contrary to the Tribe's contention, the existing NRC license remains in effect.

The Tribe next contends that the Programmatic Agreement is no longer in effect because it has expired, and the expiration renders the NRC and the Region out of compliance with NHPA section 106. 2025 Pet. at 19, 23. As support, the Tribe quotes the italicized language in the following provision: "Compliance with the procedures established by *an approved programmatic agreement satisfies the agency's section 106 responsibilities* for all individual undertakings of the program

covered by the agreement *until it expires or is terminated.*" *Id.* at 23 (quoting 36 C.F.R. § 800.14(b)(2)(iii)).[25] When read in full, the regulatory language of this provision is broader than the Tribe describes and does not compel the conclusion asserted. Rather, the regulation is simply providing that an agency can satisfy its 106 obligations by virtue of compliance with an approved programmatic agreement. Here, the Programmatic Agreement is incorporated into the UIC permits as the permits specifically bind Powertech to abide by the 2014 Programmatic Agreement for the Dewey-Burdock project. Final Class III Permit pt. XIV.A.1, at 81 ("The Permittee must abide by the Programmatic Agreement"); Final Class V Permit pt. IX.A.1, at 41 (similar). In turn, the Programmatic Agreement provides that in the event the Programmatic Agreement is terminated, Powertech must continue to follow the terms and conditions of the agreement for ground-disturbing activities and cannot begin ground-disturbing activities in unevaluated areas until a new Programmatic Agreement is executed pursuant to the NRC's license renewal process. Programmatic Agreement at 16(c). Thus, Powertech remains bound to the Programmatic Agreement terms even if the Programmatic Agreement has expired.[26] The NHPA section 106 process that underlies the UIC permits at issue has been affirmed as complete by the D.C. Circuit.[27] *See Oglala Sioux Tribe*, 45 F.4th at 306 (concluding that the NRC

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[25] It is not clear that the language relied on by the Tribe in § 800.14(b)(2)(iii) applies to the programmatic agreement in this case. Section 800.14(b) contemplates two types of programmatic agreements: to implement a particular agency program under (b)(2), or to resolve "adverse effects from certain complex project situations or multiple undertakings" under (b)(3). 36 C.F.R. §§ 800.14(b)(2), (3). Setting aside which of these provisions apply, we address the Tribe's section (b)(2) argument.

[26] In addition, the Dewey-Burdock In-Situ Uranium Recovery Facility has not yet been constructed, *see* 89 Fed. Reg. at 65,401, and any new ground disturbing activities in unevaluated areas are prohibited until a new Programmatic Agreement is put in place. Programmatic Agreement at 16(c). The permits also contain specific restrictions applicable to new discoveries, including that "[i]f a previously unknown cultural resource is discovered during implementation of the Project, all ground-disturbing activities within 150 feet of the area of discovery must halt so as to avoid or minimize impacts until the property is evaluated for listing on the NRHP [National Register of Historic Places] by qualified personnel," and require the permittee to follow Stipulation 9 of the Programmatic Agreement, which concerns unanticipated discoveries. *See* Final Class III Permit pt. XIV.A.4, at 81-82; Final Class V permit pt. IX.A.4, at 41 (similar language).

[27] For the first time, in this post-remand appeal, the Tribe argues that "there is no lawful basis for the agency to rely on a programmatic agreement (PA) to satisfy its NHPA

"reasonably satisfied its obligation under the NHPA's regulatory scheme" with respect to the source materials license for Powertech's Dewey-Burdock project); 2023 Order at 24 (concluding that because the D.C. Circuit had determined that the NRC had complied with its NHPA section 106 obligations regarding the project, so did the Region). The regulatory language the Tribe cites does not support the conclusion that expiration of a programmatic agreement somehow invalidates this comprehensive NHPA section 106 process, where compliance with the programmatic agreement is required even if the programmatic agreement has expired. The Region's designation of the NRC as the lead agency is valid and remains in effect, and the Tribe does not argue otherwise. That the NRC is starting a new NHPA process for a renewal application of the source material license does not invalidate this finding.

The Tribe also relies on extra-record documents related to Powertech's NRC license renewal application for their argument that the Region is out of

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section 106 responsibilities," because § 800.14(b)(1) restricts the use of a programmatic agreement to specified circumstances and the Region has not demonstrated that any apply. 2025 Pet. at 25. The Region argues the Tribe has not preserved this argument for appeal. 2025 Reg.'s Resp. Br. at 36-37. We agree. As our 2023 Order recognized, during the comment period, the Region stated it was considering naming the NRC as the lead federal agency for NHPA section 106 purposes and joining the Programmatic Agreement. 2023 Order at 26-27. Indeed, the Tribe challenged this proposed course of action and the Programmatic Agreement, but did not raise the argument it now presents, even though it could have. *Id.* (citing 2020 Pet. attach 2, at 7) (noting Tribe's comments stated "the lack of a competent cultural resources survey has poisoned the Programmatic Agreement such that it is not a viable means for NHPA compliance"). The Tribe does not identify any comments raising the argument it advances now, and the argument therefore has not been preserved for review. *See* 40 C.F.R. §§ 124.13,.19(a)(2)-(4); *Powertech I*, 19 E.A.D. at 32-33 (holding that for an issue to be raised on appeal, it must be raised during the comment period or public hearing with a reasonable degree of specificity); *In re Penneco Env't. Sols., LLC*, 17 E.A.D. 604, 617-18 (EAB 2018) (same). And, in any case, the D.C. Circuit expressly held that the NRC could employ a phased identification of historic properties through a programmatic agreement for the Dewey-Burdock project consistent with the special circumstances described in § 800.14(b)(1)(ii), which authorizes the use of such agreements "[w]hen effects on historic properties cannot be fully determined prior to approval of an undertaking." *Oglala Sioux Tribe*, 45 F.4th at 306. Thus, in addition to not preserving the issue, the Tribe is collaterally estopped from raising it. *See Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp., Inc.*, 590 U.S. 405, 411 (2020) (collateral estoppel "preludes a party from relitigating an issue actually decided in a prior case and necessary for judgment"); 2023 Order at 28-29 (discussing the collateral estoppel doctrine).

compliance with the NHPA. *See* 2025 Pet. at 21-23 (citing documents). Setting aside whether these documents are properly before the Board,[28] the documents do not support the Tribe's claim. For example, the Tribe relies on a March 14, 2025 letter from NRC staff to NDN Collective for their assertion that "NRC staff has conceded that it is no longer in compliance with the NHPA," *id.* at 19, and that therefore EPA is also out of compliance with the NHPA, *id.* at 23. We note that the letter does not contain the asserted concession. The March 14 letter simply states that the NRC will conduct NHPA review for Powertech's pending license renewal application. *See* 2025 Pet. attach. 36. The letter does not state or imply that the NHPA section 106 process for the existing NRC license, which remains in effect, is invalid.

The Tribe also relies on an order of the Atomic Safety Licensing Board ("ASLB"), in a preliminary proceeding granting in part a hearing on Powertech's NRC license renewal, as evidence that NRC compliance with NHPA is incomplete. *Id*. at 21-22. The ASLB order involves determinations by the ASLB on the admissibility of contentions raised in two petitions filed before it.[29] *In the Matter of Powertech (USA) Inc*., ASLBP No. 25-987-01-LR-BD01, at 3, 19 (Jan. 31, 2025) (Memorandum and Order) ("ASLB Order") (explaining that the role of the ASLB in the matter was to "rule on, among other things, standing and contention admissibility"). The Tribe claims that ASLB's admittance of a modified contention challenging the adequacy of cultural resource identification and analysis at the project site confirms that NRC compliance with NHPA is incomplete. 2025 Pet. at 23. The ASLB order, however, only allows the contention to move forward to a hearing on the merits of the Tribe's claim and, in any event, the ASLB procedural determination to proceed to a hearing is irrelevant to the UIC permits before us.

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[28] The Board has recognized "three narrow circumstances in which we may, at our discretion, consider material not included in the Region's certified administrative record: (1) to allow a petitioner to question the validity of material added to the administrative record in response to public comment, (2) to take official notice of relevant information that is publicly available and incontrovertible, and (3) to supplement the administrative record with material either that (a) is required to be included under the regulations, or (b) the Agency relied on in its permitting decision." *Gen. Elec. Co.*, 18 E.A.D. at 609. The Board has explained these exceptions previously in the context of the Dewy-Burdock UIC permit proceedings, when it denied the Tribe's motion to amend the 2020 petition with extra-record materials. 2023 Order at 16-19.

[29] The ASLB did not address the merits of any of the contentions. ASLB Order at 19.

The contention to which the Tribe refers concerns a claim related to whether the license renewal application complies with NRC regulations designed to implement *NEPA*, not the NHPA. ASLB Order at 21-42. Whether Powertech's license renewal application meets NRC's regulations regarding NEPA is of no significance here. Also, the ASLB specifically deemed inadmissible a challenge related to NHPA compliance, explaining that it was not ripe for review at that juncture. *Id*. at 20. In any event, the ASLB's evaluation of the viability of a NEPA contention in a pending NRC license renewal application does not invalidate the prior legally affirmed NHPA consultation underlying the existing NRC license and the EPA's UIC permits.

Finally, the Tribe contends that the reissued UIC permits are a new "'undertaking' under the NHPA, requiring compliance with section 106," and implies that, as a new undertaking, NHPA obligations begin anew. 2025 Pet. at 23- 24. That is incorrect. The NHPA regulations define undertaking as "a *project* * * * requiring a Federal permit, license or approval." 36 C.F.R. § 800.16(y) (emphasis added). The project requiring federal UIC permits here is the Dewey- Burdock *project*. That the Region reissued unchanged permits following the Board's narrow remand after addressing an administrative record issue does not equate to a new undertaking and does not erase the Region's compliance with NHPA section 106 for the Dewey-Burdock *project*. The project remains unchanged. As noted in the SDWA discussion, if Powertech seeks to modify the project in the future beyond the scope of the issued permits, it will have to seek a permit modification in accordance with 40 C.F.R. § 144.39. For these permits, however, the Region has met the requirements of the NHPA for the Dewey-Burdock project under consideration and nothing further is required. *Cf. McMillan Park Comm'n v. Nat'l Cap. Plan. Comm'n*, 968 F.2d 1283, 1288 (D.C. Cir. 1992) (finding that where "a project has previously satisfied the § 106 process, then nothing would be gained by further review if there are no new, unconsidered elements presented by the project").[30]

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[30] In *McMillan,* the court was considering the definition of "undertaking" in a prior regulatory version of the rule that included "new and continuing projects." *McMillan*, 968 F.2d at 1284-85. While the current definition of "undertaking" does not include a continuing obligation to evaluate previously-approved projects, the concept from *McMillan* remains relevant—nothing is gained by requiring further review where the Region previously completed an NHPA section 106 process and there are no new, unconsidered elements presented by the project.

In further support of its argument that section 106 requirements apply anew to reissued permits for "ongoing federal actions," the Tribe relies on two cases: *Vieux Carre Prop. Owners, Residents & Assocs. v. Brown*, 948 F.2d 1436, 1445 (5th Cir. 1991), and *Morris Cnty. Tr. for Hist. Pres. v. Pierce*, 714 F.2d 271, 279 (3d Cir. 1983). These cases are inapposite. First, both cases involved ongoing projects that had not been subjected to the NHPA section 106 process, which is clearly not the case before us. *Vieux Carre*, 948 F.2d at 1439-40 (noting that the agency did not employ the NHPA section 106 process when approving the applicant's project under a nationwide permit); *Morris Cnty.*, 714 F.2d at 280 ("It is undisputed that [the federal agency] did not at any time take into account the effect of the [project] on [historic resources]."). Second, both *Morris County* and *Vieux Carre* involved consideration of a prior regulatory definition of "undertaking" that included "continuing projects," which has since been removed. *See Havasupai Tribe v. Provencio*, 906 F.3d 1155, 1164 (9th Cir. 2018) (acknowledging that the current definition of undertaking no longer includes language specific to a continuing obligation).[31]

Here, as determined prior to remand, the Region has met its NHPA obligations for the Dewey-Burdock project and none of the alleged new circumstances identified in the post-remand petition dictate a different result.

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[31] The Board is not suggesting that the Region has no continuing obligations under NHPA. As the Ninth Circuit has noted, "[a]lthough continuing obligations have been removed from the definition of 'undertaking,' they remain in 36 C.F.R. § 800.13(b)." *Havasupai Tribe*, 906 F.3d at 1164; *see* 36 C.F.R. § 800.13(b) (obligating federal agencies to either establish their own protocol on what to do if a historic property is discovered during implementation of a project or follow specific procedures if no process is in place at the time of the discovery). Consistent with § 800.13(a), the Programmatic Agreement includes a provision addressing unanticipated discovery of historic properties made during implementation of the project. *See* Programmatic Agreement, Stipulation 9, at 10 (addressing requirements for unanticipated discoveries); Final Class III Permit pt. XIV.A.4, at 82 ("The permittee must ensure the steps listed under Stipulation 9 of the PA are followed."); Final Class V Permit pt. IX.A.4, at 41 (same). Additionally, the Region has obligations under the phased approach for identification and evaluation of historic properties. 2023 Order at 22-25; *see also Oglala Sioux Tribe*, 45 F.4th at 306 (upholding NRC's approach of having a process in the 2014 Programmatic Agreement for addressing newly discovered properties and ensuring that they are protected and evaluated for listing on the National Register of Historic Places comported with the governing regulations).

VI. *CONCLUSION*

Having considered all of the arguments raised, and for the reasons stated above, the Board denies the petition for review in its entirety.[32]

So ordered.

[32] All pending motions are denied as moot.

CERTIFICATE OF SERVICE

I certify that copies of the foregoing *Order Denying Review* in the matter of Powertech (USA) Inc., UIC Appeal No. 25-01, were sent to the following persons in the manner indicated.

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