

BEFORE THE ENVIRONMENTAL APPEALS BOARD  
 U.S. ENVIRONMENTAL PROTECTION AGENCY  
 WASHINGTON, D.C.

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ORAL ARGUMENT

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IN THE MATTER OF:	:
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	:
POWERTECH (USA) INC.,	: UIC Appeal No.
	: 20-01
	:
Permit No. SD31231-00000	:
Permit No. SD52173-00000	:
	:

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Thursday,  
 March 14, 2024

1201 Constitution Avenue NW  
 Washington, D.C.

The above-entitled matter came on for  
 hearing, pursuant to notice, at 1:30 p.m., EDT

BEFORE:

THE HONORABLE AARON P. AVILA  
 THE HONORABLE WENDY L. BLAKE  
 THE HONORABLE MARY KAY LYNCH  
 Environmental Appeals Judges

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ALSO PRESENT: Emilio Cortes, Clerk of the Board

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1 P-R-O-C-E-E-D-I-N-G-S

2 (1:30 p.m.)

3 MR. CORTES: All rise.

4 The Environmental Appeals Board of the  
5 United States Environmental Protection Agency is  
6 now in session for oral argument in the matter of  
7 Powertech (USA) Inc., UIC Permit Appeal No. 20-  
8 01. The honorable Judges Aaron P. Avila, Wendy  
9 L. Blake, and Mary Kay Lynch presiding.

10 Please turn off all cell phones. No  
11 recording of these proceedings is allowed.  
12 Please be seated.

13 JUDGE BLAKE: Thank you, and good  
14 afternoon everyone. The Environmental Appeals  
15 Board is hearing argument today on a petition for  
16 review of two Underground Injection Control  
17 permits issued by EPA Region 8 to Powertech  
18 (USA), Incorporated under the Safe Drinking Water  
19 Act.

20 In addition to those of us in the  
21 courtroom today, I'd like to note that counsel  
22 for Petitioner, Oglala Sioux Tribe, is

1 participating in the oral argument by  
2 videoconference. Today's argument is also being  
3 live-streamed to the public.

4 In an order dated November 16, 2023,  
5 the Board denied the National Historic  
6 Preservation Act Section 106 issue raised in the  
7 petition and identified the issues remaining for  
8 Board resolution in this case.

9 Those issues, which are the subject of  
10 today's argument, include the reference in the  
11 petition to Section 110 of the National Historic  
12 Preservation Act, the National Environmental  
13 Policy Act claim, the Safe Drinking Water Act  
14 claim, and the Administrative Procedure Act  
15 claim.

16 Last month, the Region filed a motion  
17 to strike and alternative motion for leave to  
18 file a surreply. That motion is briefed, and the  
19 Board takes the motion under advisement.

20 The argument today will follow the  
21 Board's November 16, 2023, order scheduling  
22 briefing and oral argument. The Board has

1 allocated 60 minutes for oral argument, and we  
2 will proceed as follows:

3 First, we will hear from Petitioner  
4 Oglala Sioux Tribe. Petitioner has been  
5 allocated a total of 30 minutes and may reserve  
6 up to 10 minutes of their allocated time for  
7 rebuttal.

8 Second, we will hear from EPA Region  
9 8, which has been allocated a total of 20  
10 minutes.

11 Third, we will hear from Powertech,  
12 which has been allocated a total of 10 minutes.

13 Finally, if Petitioner elects to  
14 reserve time for rebuttal out of their 30 minute  
15 total, we will hear that rebuttal.

16 The Clerk of the Board will keep track  
17 of the time.

18 Before we begin, I want to ask for  
19 everyone's cooperation as we conduct this  
20 argument in a hybrid environment using some new  
21 courtroom equipment.

22 The court reporter is preparing a

1 transcript of today's proceeding and that  
2 transcript will be later posted on the docket for  
3 this matter on the Board's website.

4 It is critically important that the  
5 court reporter capture the arguments, so we ask  
6 those presenting today to speak closely and  
7 directly into the microphone. That means you may  
8 need to lean into the microphone a little to  
9 ensure that the panel and the court reporter can  
10 hear you.

11 As for the Tribe's counsel, who is  
12 participating virtually, please keep your camera  
13 and microphone off unless it is your turn to  
14 speak.

15 Now, if there are any audio issues,  
16 please let us know so that we can repeat  
17 questions and work to resolve the issues.

18 I ask the court reporter to alert us  
19 if they cannot hear what is being said.

20 If you are here in the courtroom,  
21 please do not log onto the Zoom link that is  
22 available on the Board's website for the public

1 to view the argument as this can create audio  
2 issues for those participating remotely.

3 If there are any technical issues,  
4 please let us know immediately so that we can  
5 work to try to resolve them.

6 Oral argument is an important  
7 opportunity for you to explain your contentions  
8 and the important issues in this case to the  
9 Board. It is also an opportunity for the judges  
10 to explore with you the contours of your  
11 arguments and the issues in this case.

12 You should assume that we have read  
13 the briefs and other submissions. You should not  
14 assume that the judges have made up their minds  
15 about any of the issues in the case but, instead,  
16 we are using this as an opportunity to listen, to  
17 help us understand your position, and to probe  
18 the legal and record support on which the Region  
19 based its permit decisions.

20 I would now like to call on the  
21 attorneys for each party to introduce themselves  
22 and identify who they represent. I would ask



1 that we begin with counsel for the Oglala Sioux  
2 Tribe, followed by EPA Region 8, and then  
3 Powertech.

4 So, let's start with the Oglala Sioux  
5 Tribe. And please indicate for the record  
6 whether you are reserving time for rebuttal and  
7 how much time you would like to reserve.

8 MR. PARSONS: Thank you, Your Honors.  
9 Jeff Parsons on behalf of Petitioner Oglala Sioux  
10 Tribe. And I intend to reserve 10 minutes for  
11 rebuttal.

12 JUDGE BLAKE: Thank you. Region 8.

13 MR. BOYDSTON: Good afternoon, Your  
14 Honors. Mike Boydston for Region 8. I'll be  
15 discussing National Historic Preservation Act  
16 issues.

17 MS. CHIN: Good afternoon, Your  
18 Honors. Lucita Chin with Region 8, and I will be  
19 discussing Safe Drinking Water Act and  
20 administrative law issues.

21 MS. PERKINS: And good afternoon, Your  
22 Honors. I'm Erin Perkins, and I will be

1 discussing NEPA issues today.

2 JUDGE BLAKE: Thank you. And  
3 Powertech.

4 MR. HILL: Good afternoon. I'm Jason  
5 Hill here on behalf of Powertech. I'll be  
6 discussing NHPA, NEPA, and APA issues.

7 MR. VAN VOORHEES: Bob Van Voorhees on  
8 behalf of Powertech, and I'll be addressing the  
9 Safe Drinking Water Act issues.

10 JUDGE BLAKE: Thank you for the  
11 introductions. And now I would ask counsel  
12 present in the courtroom to please mute the  
13 microphone at the counsel table for the remainder  
14 of the argument to reduce the potential for any  
15 audio interference.

16 To the Region and Powertech, I want to  
17 thank you for in your introductions also  
18 identifying the issues that each of you will be  
19 arguing.

20 Before we begin, Counsel Parsons, I  
21 want to confirm that you can see and hear us in  
22 the courtroom.

1 MR. PARSONS: I can, Your Honor.

2 Thank you.

3 JUDGE BLAKE: Then let's proceed.

4 MR. PARSONS: Thank you, Your Honors.

5 Jeff Parsons on behalf of the Oglala Sioux Tribe.

6 May it please the court, I will let  
7 you know that in the last couple of days I've  
8 come down with some pretty severe flu symptoms.  
9 I'm pretty heavily medicated. I think I can  
10 conduct myself without too much trouble.

11 But, certainly, if you find my  
12 responses or any statements are lacking in  
13 clarity, please ask me to re-articulate.

14 Thank you.

15 So, this case is an interesting one.  
16 It's a different sort of case because the lands  
17 at issue here are treaty lands. These are lands  
18 that are subject to the Great Lakota Nations  
19 Treaties of 1868. And because of that, the EPA  
20 Region 8 has, as discussed in our petition, has a  
21 trust responsibility.

22 So, I would just like to make sure

1       that that overlay is stated and that the court is  
2       aware that this is sort of an unusual case in  
3       that regard.

4               And, of course, one of the primary  
5       issues has to do with cultural resources on the  
6       site. This is an area of the Black Hills that is  
7       sacred to the Tribe. It is a place where for  
8       millennia ceremonies have been conducted --

9               JUDGE BLAKE: Counsel, can I stop you  
10      there?

11              MR. PARSONS: -- burials --

12              JUDGE BLAKE: Counsel, I'm sorry. Can  
13      I stop you there for a moment?

14              MR. PARSONS: Yes.

15              JUDGE BLAKE: Because I want to start  
16      with your National Historic Preservation Act  
17      Section 110. You refer to that section in your  
18      brief.

19              But where in the comments and the  
20      petition do you identify the specific provisions  
21      of Section 110 of the National Historic  
22      Preservation Act that the Region violated, what

1       that section requires, and how the Region in fact  
2       violated that section?

3                   MR. PARSONS:   Sure.   Thank you, Your  
4       Honor.

5                   The requirements come from, largely  
6       from the caselaw.   As stated in our reply,  
7       discussed in our reply, Section 110 requires an  
8       agency to comply to the fullest extent possible  
9       with its consultation process.

10                  And in this case that did not occur.  
11       Even the NRC when it upheld the, when it upheld  
12       the NRC staff's consultation duties it did so by  
13       a bare minimum, as its stated conclusion.

14                  JUDGE BLAKE:   Can I get clarification  
15       on this?

16                  I want to understand how your  
17       argument, you mentioned that your Section 110  
18       NHPA argument is premised on case law, not a  
19       statutory provision.   I wanted to hear what  
20       specific statutory provision imposed a  
21       requirement that the Region allegedly did not  
22       meet?

1 MR. PARSONS: Thank you, Your Honor.

2 I think Section 110 is a, sort of a --  
3 essentially is like an exclamation point on the  
4 consultation duties. And that's how the courts  
5 have interpreted it.

6 And so, the case law does not identify  
7 specific provisions of Section 110, but goes into  
8 the thrust of that section and requires that when  
9 fulfilling its consultation duties, that the  
10 Agency does comply to the fullest extent  
11 possible.

12 And in this case, of course, the  
13 Agency, the Region, failed to even conduct a  
14 cultural resources survey on the site. As a  
15 result, there was no opportunity for the Tribe to  
16 help identify or identify cultural resources or  
17 talk about --

18 JUDGE LYNCH: Counsel, can I pause you  
19 for a second?

20 MR. PARSONS: -- or evaluate the  
21 impacts.

22 JUDGE LYNCH: Counsel, didn't the D.C.

1 Circuit address the survey issue in its ruling on  
2 106 and find that there was no violation of the  
3 National Historic Preservation Act?

4 So, beyond section 106, what under 110  
5 are you alleging here specifically?

6 And how is it different from what the  
7 D.C. Circuit ruled on?

8 And just to remind you --

9 MR. PARSONS: Thank you, Your Honor.  
10 Yes.

11 JUDGE LYNCH: -- the D.C. Circuit  
12 specifically said that a survey was not  
13 necessary.

14 MR. PARSONS: Yes, the D.C. Circuit  
15 upheld the NRC's bare minimum compliance with the  
16 National Historic Preservation Act. I would  
17 submit that EPA, based on -- and, of course, 110  
18 was not at issue in that case at all. It never,  
19 it never arose. And, so, I would point to that  
20 as a distinction.

21 JUDGE LYNCH: And we're trying to  
22 figure out how it's arising in this case other

1       than you have one sentence on 110 in your  
2       comments, and one sentence in your petition. And  
3       we're trying to determine what you're alleging.

4               MR. PARSONS: Understood.

5               What we're alleging is that the Region  
6       did not fulfill its obligations under 110.

7               JUDGE LYNCH: How?

8               MR. PARSONS: To comply to the maximum  
9       extent possible. That by failing to give the  
10      Tribe a reasonable opportunity to identify  
11      cultural resources, impacts, and potential  
12      mitigation to those impacts EPA Region 8 --

13              JUDGE LYNCH: And, counsel, how are  
14      those --

15              MR. PARSONS: -- did not fulfill its  
16      obligations.

17              JUDGE LYNCH: How are those facts --

18              MR. PARSONS: Sorry.

19              JUDGE LYNCH: -- different from what  
20      was before the D.C. Circuit and what they ruled  
21      on?

22              MR. PARSONS: Of course, EPA is a



1 different agency. And, again, Section 110 was  
2 never presented to the D.C. Circuit.

3 JUDGE LYNCH: I'm asking about --

4 MR. PARSONS: It never came, it was  
5 never part of that.

6 JUDGE LYNCH: I'm asking about the  
7 facts surrounding the consultation.

8 MR. PARSONS: Well, EPA has its own  
9 independent consultation responsibilities. This  
10 came up in 2020, in the year 2020, of course the  
11 COVID year.

12 And there were meetings scheduled in  
13 June of that year, as is laid out in the  
14 petition. There were meetings scheduled in June  
15 of that year that EPA canceled because of COVID  
16 restrictions.

17 When it came back around for those  
18 meetings to actually occur again in September and  
19 October of 2020, COVID had started to ravage the  
20 Pine Ridge Reservation. And so, the Tribe needed  
21 to cancel the meetings in order to fulfill --

22 JUDGE LYNCH: And, counsel --

1 MR. PARSONS: -- its responsibilities  
2 to its --

3 JUDGE LYNCH: -- can I pause you  
4 again?

5 MR. PARSONS: And, sorry. Sure. Of  
6 course.

7 JUDGE LYNCH: Those consultation  
8 proceedings were ones that both the D.C. Circuit  
9 and this Board ruled on in the context of 106;  
10 right?

11 So, what additional specific  
12 obligations did the Region have and violate under  
13 110 specifically?

14 We have your 110 --

15 MR. PARSONS: And I --

16 JUDGE LYNCH: Yes?

17 MR. PARSONS: Yes, so the discussion  
18 in the petition talks about the failure to  
19 conduct a cultural resources survey. That is  
20 essentially the crux.

21 And the 110 says, as interpreted by  
22 the case law, that it must comply to the fullest

1 extent possible. By failing to conduct that  
2 survey it violated, the Region violated 110.  
3 That is, that is the argument.

4 JUDGE LYNCH: And so, you're -- so,  
5 how are we to account for the D.C. Circuit's  
6 ruling that cultural survey was not necessary?  
7 Do we take -- are you saying we just ignore that?

8 MR. PARSONS: I would say that under  
9 one-oh -- that was the ruling they made with  
10 respect to 106, but 110 was not at issue. So, I  
11 think that there is room to distinguish, yes.

12 JUDGE LYNCH: And what section? Point  
13 me to what section in 110 imposes additional  
14 duties in that regard beyond 106?

15 MR. PARSONS: Again, that comes out of  
16 the case law, Your Honor, which we cited and  
17 quoted in our reply.

18 And, of course, the failure to do the  
19 cultural resources survey is a significant NEPA  
20 violation as well. And that's a serious problem.

21 JUDGE BLAKE: Could we turn for a  
22 minute to that?

1 I'd like to first ask you, can you  
2 point to where in the petition you address the  
3 Region's response to comments pertaining to the  
4 application of NEPA in the context of the UIC  
5 permits, the response to comment 262?

6 MR. PARSONS: I do not find 262 in  
7 the, in the petition. However, throughout,  
8 throughout the response to comments the EPA  
9 stated that they did not need to conduct a  
10 cultural resources survey because, in their view,  
11 NEPA does not apply to EPA in a UIC permitting  
12 process because of the functional equivalence  
13 doctrine.

14 And as we stated in brief, the  
15 functional equivalence doctrine is not such a  
16 broad waiver of NEPA, it is not a statutory  
17 exemption from NEPA. In fact --

18 JUDGE AVILA: Excuse me. I'm sorry.

19 MR. PARSONS: -- functional  
20 equivalence applies --

21 JUDGE AVILA: Can I interrupt?

22 Isn't there a long line of Board

1 cases, including Windfall Oil and Gas, that has  
2 said the UIC program is the functional equivalent  
3 of NEPA? So, and the 8th Circuit held that as  
4 well.

5 MR. PARSONS: Yes, Your Honor. But  
6 it's not so clear. And in those cases the  
7 argument being made by the petitioner or the  
8 plaintiffs or appellants was that an EIS was  
9 required.

10 The functional equivalence dispenses  
11 with the formal requirement for an EIS but  
12 specifically requires that all substantive and  
13 procedural standards are met to ensure full and  
14 adequate consideration of environmental issues.

15 So, while, while the UIC program has  
16 the potential, certainly, to fall in the  
17 functional equivalence, to the extent that, to  
18 the extent that the analysis does not represent  
19 that whole and adequate consideration of  
20 environmental issues, it is not functionally  
21 equivalent --

22 JUDGE LYNCH: Well --

1                   MR. PARSONS:  -- and, therefore, not  
2 compliant with NEPA.

3                   JUDGE LYNCH:  On page 25 of your  
4 petition you acknowledge that the permit is not  
5 subject to an EIS.  Correct?

6                   MR. PARSONS:  That is correct.

7                   JUDGE LYNCH:  But in your petition all  
8 the NEPA regulatory provisions you identify are  
9 all under Section 1502 in the regulation, which  
10 is the EIS provision of the regulation.

11                  MR. PARSONS:  So, I think that this is  
12 -- I don't think that that's an accurate, sort of  
13 an accurate summation of the, of the functional-  
14 equivalence doctrine.

15                  JUDGE LYNCH:  No.  I'm talking about  
16 the regulation.

17                  MR. PARSONS:  Yes.  The full --

18                  JUDGE LYNCH:  And the EIS.

19                  MR. PARSONS:  I understand that.  But

20                  --

21                  JUDGE LYNCH:  Other than 15 --

22                  MR. PARSONS:  -- the full steps of an

1 E --

2 JUDGE LYNCH: Go ahead.

3 MR. PARSONS: Uh-huh. I was going to  
4 say that the requirement for a hard look under  
5 NEPA still applies, regardless of whether it's an  
6 EIS or not.

7 It doesn't -- they don't have, EPA  
8 Region 8 does not have to prepare a formal EIS  
9 for this project. But they certainly have to  
10 fulfill NEPA's requirement to take a hard look.

11 And that's where this language from  
12 the case law, starting back in the D.C. Circuit  
13 with Portland Cement, which effectively created  
14 the functional equivalence doctrine, that the  
15 Agency, in order to comply with the functional  
16 equivalence doctrine, must ensure full and  
17 adequate consideration of environmental issues.

18 And so, that hard look doctrine that's  
19 inherent in NEPA is -- is not waived simply  
20 because the Agency does not have to prepare a  
21 formal EIS.

22 JUDGE LYNCH: What other section of

1 NEPA are you referring to in the statute?

2 MR. PARSONS: Well, the basic, well,  
3 the basic requirements of the statute it  
4 requires, again, it's the fundamental aspect --

5 JUDGE LYNCH: And -- Yes.

6 MR. PARSONS: -- of NEPA that requires  
7 a hard look.

8 JUDGE LYNCH: Which the courts have  
9 consistently ruled the UIC program does. That it  
10 is the --

11 MR. PARSONS: Well --

12 JUDGE LYNCH: And the court language  
13 talks about the UIC and Safe Drinking Water Act  
14 program.

15 MR. PARSONS: I would submit that that  
16 disc -- those discussions talk about the fact  
17 that the Agency does not need to prepare a formal  
18 EIS in order to dispense with its duties under  
19 NEPA.

20 JUDGE LYNCH: So, what do they need to  
21 do?

22 MR. PARSONS: But it still must --



1 JUDGE LYNCH: So, are you saying, so  
2 let's turn for a moment to the cumulative impacts  
3 analysis which bears a specific regulatory  
4 requirement and definition under UIC; right?

5 MR. PARSONS: Well, that's another  
6 issue in this case --

7 JUDGE LYNCH: Are you saying they have  
8 --

9 MR. PARSONS: -- because --

10 JUDGE LYNCH: Go ahead.

11 MR. PARSONS: Go ahead. I'm sorry.

12 JUDGE LYNCH: Are you saying that --

13 MR. PARSONS: I was going to say that  
14 that's another issue in this case.

15 JUDGE LYNCH: Go ahead. You go.

16 MR. PARSONS: That's another issue in  
17 this case because, because the Agency says that  
18 the cultural -- or, excuse me, the cumulative  
19 impact analysis is, is narrow. It does not, it  
20 does not require, is not the equivalent of the  
21 NEPA cumulative impact.

22 JUDGE LYNCH: All right. So, let me

1 pause you there.

2 MR. PARSONS: That's Region 8's  
3 position.

4 JUDGE LYNCH: So are you saying that  
5 the Region has to do two cultural -- cumulative  
6 impact analyses, one under UIC and one under  
7 NEPA?

8 MR. PARSONS: I'm saying based on the  
9 facts of this case that EPA Region 8 failed to  
10 take a hard look and failed to ensure full and  
11 adequate consideration of environmental issues,  
12 including a competent cultural resources survey.

13 JUDGE BLAKE: But, counsel --

14 MR. PARSONS: Failure looking --

15 JUDGE BLAKE: Counsel.

16 MR. PARSONS: Sure.

17 JUDGE BLAKE: What precedents, I'm  
18 struggling a little bit just, again, with the  
19 contour of your argument and the support for it.

20 Back in 2007 in the final rule EPA  
21 explained the functional equivalence doctrine  
22 that courts had adopted, explained that EPA

1 actions under these statutes are functionally  
2 equivalent to the analysis required under NEPA if  
3 they are undertaken with full considerations of  
4 environmental impacts and opportunities for  
5 public comment.

6 So, we, the Board itself, as Judge  
7 Avila noted in the Windfall case has concluded  
8 that the UIC program is the functional equivalent  
9 of NEPA.

10 So, what I'm, what I need a little  
11 help with is what analysis did the Region fail to  
12 do? How did it clearly err under NEPA with  
13 regard to the UIC permits at issue?

14 MR. PARSONS: It failed, first and  
15 foremost it failed to conduct a cultural  
16 resources survey.

17 It's, it's approving wells out on this  
18 land that very well could be in the middle of a  
19 sacred site, in the middle of a burial, in the  
20 middle of a ceremonial site. There are not --  
21 there is no data for the Agency to be able to  
22 determine the impacts of those wells on the land

1       because it failed to look at those impacts.

2               JUDGE LYNCH: Can I ask you --

3               MR. PARSONS: And also --

4               JUDGE LYNCH: I'm sorry. Go ahead.

5               MR. PARSONS: Well, there are other  
6       examples. Obviously, we briefed it extensively  
7       in the petition from 25, pages 25 to 32.  
8       There's a litany of examples of places where the  
9       Agency failed to look at.

10              And so, when you say it's the  
11       functional equivalent, it's only the functional  
12       equivalent again if it ensures full and adequate  
13       consideration of environmental issues. And on  
14       the facts of this case our position is there are  
15       specific instances, examples where the Agency did  
16       not fulfill that obligation.

17              JUDGE LYNCH: Counsel, I wanted to ask  
18       --

19              MR. PARSONS: So, as a general matter  
20       -- Sure.

21              JUDGE LYNCH: No, go ahead.

22              MR. PARSONS: No, I was -- I'm

1 finished. Thank you.

2 JUDGE LYNCH: I want to ask you about  
3 the NEPA regulations that you rely on in your  
4 petition. And, for example, the regulation you  
5 cite on cumulative impacts analysis.

6 At the time this permit decision was  
7 made the NEPA regulations had been changed and  
8 they removed the definition of cumulative  
9 impacts. It wasn't in there.

10 So, what version under the NEPA  
11 regulations are you relying on? Putting aside  
12 whether NEPA applies.

13 MR. PARSONS: Yes, Your Honor. That  
14 -- Sure.

15 The Agency, Region 8 has not raised  
16 that issue. I would submit that this decision  
17 has to stand or fall by the rationale articulated  
18 by the Agency.

19 And it's certainly the UIC  
20 requirements, regulations do require a cumulative  
21 impact analysis.

22 And regardless of the cumulative

1 impact requirement, that hard look mandate from  
2 NEPA still applies regardless. Even if it  
3 wasn't, wasn't falling within the cumulative  
4 impacts analysis, the failure to look at things  
5 like a cultural resources survey, and inadequate  
6 groundwater data, and surrounding projects, and  
7 transport of radioactive waste across the  
8 country, all of those are issues that are  
9 required to be reviewed in order to meet NEPA's  
10 hard look mandate, and in order to fall within  
11 the exempt -- the functional equivalence  
12 exemption to ensure full and adequate  
13 consideration of environmental issues.

14 JUDGE AVILA: Can I ask about the  
15 administrative record, or the Administrative  
16 Procedure Act issue you raised?

17 Can you just tell me, I'm having a  
18 hard time figuring out which documents, or  
19 document or documents exactly you claim aren't in  
20 that administrative record that should be?

21 I mean, can you just give me the  
22 litany or the list or what documents in

1 particular?

2 MR. PARSONS: Yes. Yes, Your Honor.

3 So, in fact, Region 8 made a  
4 determination that nothing is in the  
5 administrative record prior to 2013. That's in  
6 response to comments No. 185.

7 JUDGE AVILA: Yeah. I guess --

8 MR. PARSONS: And, of course, all of  
9 the --

10 JUDGE AVILA: -- what I, what I want  
11 to know is what documents in particular do you  
12 think -- what specific documents do you think  
13 should be in the record?

14 JUDGE AVILA: Is it attachment --

15 MR. PARSONS: Well, so --

16 JUDGE AVILA: Is it attachments 29,  
17 30, 32 through 34 to your petition? Is that the  
18 full universe of things that you're asking or  
19 think that should be in the record?

20 MR. PARSONS: Well, so we're at a bit  
21 of a disadvantage here; right? The Agency is the  
22 keeper of the administrative record. And so,

1        what we, what we did was obtain some of those  
2        documents.

3                    And we believe that the documents we  
4        submitted in those examples that you cite  
5        demonstrate a serious problem with respect to the  
6        back door rulemaking. That the Agency met with  
7        industry and their consultants for more than a  
8        year to effectively develop regulations for EPA  
9        as this is the first exercise in permitting an  
10        ISL mine ever.

11                   JUDGE BLAKE: But, counsel, to --

12                   MR. PARSONS: And so --

13                   JUDGE BLAKE: Counsel, to go to Judge  
14        Avila's question, though, what exactly are you  
15        asserting?

16                   You stated in your petition on page 43  
17        that all of the documents and records, including  
18        all emails reflecting the coordination between  
19        EPA and Powertech and any of its consultants must  
20        be made part of the administrative record.

21                   What we're struggling with, what I'm  
22        struggling with is what exactly are you asking



1 the Board, or suggesting in your petition must  
2 have been included, or should have been included  
3 in the administrative record by the Agency?

4 And the second question to that is --

5 MR. PARSONS: I think --

6 JUDGE BLAKE: -- what is your legal  
7 theory under, given the regulations define what  
8 constitutes the record for the draft permit and  
9 the final permit, what is your, what is your  
10 support?

11 So, first, scope, and then what's your  
12 basis for your requested inclusion of additional  
13 documents?

14 MR. PARSONS: Sure.

15 Sure. Well, I think all of the  
16 documents that gave rise to the Agency's  
17 formulation of those definitions and  
18 characterizing the term -- the definitions for  
19 the terms in the UIC program need to be in the  
20 administrative record.

21 I would submit that this Board should  
22 remand back to the Agency so they can complete

1       that record so you can have a full picture of all  
2       of the interaction between the industry and  
3       Region 8 where they, to the exclusion of the  
4       public and the Tribe, where they figured all this  
5       out.

6                   JUDGE BLAKE:   Counsel --

7                   MR. PARSONS:   Or --

8                   JUDGE BLAKE:   -- what definitions are  
9       you referencing?

10                   Are you referring to attachment 30  
11       attached to your petition or are you discussing  
12       different documents that allegedly concern  
13       definitions?

14                   MR. PARSONS:   Well, those, yeah,  
15       that's certainly one aspect of it.

16                   Let me, so the definitions, the  
17       definitions were created by the industry in  
18       league with EPA, to the exclusion of the public.  
19       And those --

20                   JUDGE BLAKE:   Can you just clarify --

21                   MR. PARSONS:   I'm trying to find 30.

22                   JUDGE BLAKE:   -- what definitions?

1 I'm sorry, counsel, but what definitions?

2 MR. PARSONS: Yeah, the area of  
3 review, zone of influence, and aquifer exemption  
4 boundary determinations. Those were the central  
5 pieces, it appears, from the incomplete records  
6 that I have been able to obtain through the  
7 Freedom of Information Act.

8 The problem is, is without the Agency  
9 submitting that record and certifying that it's  
10 complete, I think this Board lacks the whole  
11 record, which is, of course, the basis for any  
12 Administrative Procedure Act determination, is  
13 based on the whole record.

14 In this case, the EPA specifically and  
15 deliberately excluded all documents prior to  
16 2013. And in that way deprives this Board of the  
17 whole record upon which to base a decision.

18 JUDGE AVILA: So, is your argument one  
19 that we don't have the full record before us and  
20 we should -- the record should be supplemented  
21 before we continue with our review? Is that what  
22 you're arguing?

1                   MR. PARSONS: I think that that would  
2 be certainly a prudent course. I think not  
3 having the whole record when the Agency excludes  
4 something like six or seven years of records from  
5 the administrative record, of documents from the  
6 administrative record is problematic.

7                   And, but I will also say that the  
8 documents that are included in the attachments we  
9 gave demonstrate that what the industry and EPA  
10 Region 8 did was create binding norms, which is  
11 the trigger for a de facto rulemaking.

12                  JUDGE BLAKE: And, actually --

13                  MR. PARSONS: And so I think that when  
14 they talk --

15                  JUDGE BLAKE: Can I stop you there?

16                  MR. PARSONS: Sure.

17                  JUDGE BLAKE: This is again a scope  
18 question.

19                  Can you identify for us, first, what  
20 are you claiming constitutes de facto rulemaking?  
21 Are you claiming that all of the materials  
22 included in attachments 29 and 30, and 32 to 34

1 of the petition constitute de facto rulemaking?

2 Or are you asserting that attachment  
3 30 to the petition constitutes de facto  
4 rulemaking?

5 So, again, just a scope issue to try  
6 to frame up to make sure that we're focused on  
7 your precise argument.

8 MR. PARSONS: Sure.

9 And, again, I think, unfortunately,  
10 we're at a disadvantage because the Agency has  
11 expressly declined to provide the record, the  
12 records, the whole administrative record for us  
13 to be able to determine exactly what happened in  
14 that instance.

15 But, certainly, creation of all those  
16 definitions is, is that creation of those binding  
17 norms.

18 JUDGE AVILA: But I guess what I'm  
19 struggling with is it, are you arguing that an  
20 email between Powertech and the Region, every one  
21 of those is a de facto rulemaking?

22 Or is it -- I think we're just trying

1 to get a, or I'm trying to get a handle on which  
2 of these documents, what, what things in the  
3 record do you think is a de facto rulemaking?

4 MR. PARSONS: I think it is primarily  
5 the definitions that they came to agree on. How,  
6 how they were going to define, like I said, area  
7 of review and zone of influence, et cetera.

8 And that, of course, is briefed, area  
9 of review, zone of influence, and aquifer  
10 exemption boundary determinations. Those were  
11 the definitions that they spent a year figuring  
12 out amongst themselves to the exclusion of the  
13 public in such a way that those definitions would  
14 carry forward to apply to every future ISL  
15 permit.

16 And that is the binding norm.

17 JUDGE BLAKE: Counsel, is it your  
18 position, are you -- in what you just described,  
19 are you referring to attachment 30 or are you  
20 referring to a series of documents, including  
21 emails that might have been back and forth  
22 between the Region and Powertech?

1 MR. PARSONS: I think the emails are  
2 by way of example to show the extent of the  
3 detailed communications between industry and EPA  
4 Region 8.

5 Attachment 30 does provide sort of an  
6 overview, and does provide the examples of the  
7 definitions. At least that's the best document  
8 that I have been able to find that demonstrates  
9 the specific definitions from the regulations  
10 that EPA was defining, Region 8 was defining with  
11 industry to the exclusion of the public.

12 JUDGE BLAKE: Can I ask you --

13 MR. PARSONS: Now, again --

14 JUDGE BLAKE: I'm just going to pause  
15 you there on attachment 30.

16 MR. PARSONS: -- there may be more.

17 JUDGE BLAKE: What in attachment 30 --  
18 you talked about defining critical terms -- what  
19 in attachment 30 is not consistent with the UIC  
20 regulations? What is -- what are you alleging is  
21 different and is creating a binding norm?

22 MR. PARSONS: So, those definitions

1 demonstrate how, how the Agency is going to  
2 determine what an area of influence is, what a  
3 zone of influence is, what an area of review is.

4 And so, certainly I can imagine that  
5 the public might have a view that those areas or  
6 zones of influence need to be, need to be  
7 broader, or need to contain more variables to  
8 account for things, like at this site where you  
9 have thousands of unidentified boreholes, another  
10 example of the lack of data.

11 JUDGE BLAKE: Counsel, that's --

12 MR. PARSONS: And so --

13 JUDGE BLAKE: -- that's an excellent  
14 point that you're making right now. I want to  
15 just follow up on that for a moment.

16 You talked about boreholes, which  
17 takes us to another issue that I had a question  
18 on. But isn't it the case that the public had an  
19 opportunity to review the definition of the area  
20 of review and other aspects of the permit terms  
21 and conditions through the two comment periods  
22 that the Region provided?



1                   And did the Tribe comment on those  
2 definitions in that, in those intervals?

3                   MR. PARSONS: Well, so the -- those  
4 definitions were, were agreed upon and formed the  
5 basis for the application to the, to the Agency.  
6 And so, so the Tribe had no opportunity to be  
7 involved in that, obviously.

8                   And certainly --

9                   JUDGE AVILA: I'm sorry.

10                  MR. PARSONS: -- I would submit --

11                  JUDGE AVILA: Did you comment that the  
12 area of review was incorrect in this case during  
13 the administrative process?

14                  MR. PARSONS: Well, I think by -- I  
15 essentially did.

16                  I mean, we list several examples of,  
17 for instance, those boreholes and the fractures  
18 and fissures that are unidentified out on the  
19 site. And I think that is getting at those same  
20 issues with respect to the zone of influence,  
21 like how the fluid is going to move around.

22                  So, I would submit that, in effect,

1       yes, that the Tribe did comment on, on those  
2       issues with close enough proximity that it  
3       satisfies. And that's the problem with this  
4       whole process is that, from our perspective, from  
5       the Tribe's perspective EPA permitted, is  
6       permitting first and reviewing later, if at all.

7               JUDGE BLAKE: Actually, can I, can I  
8       stop you there?

9               MR. PARSONS: It's not going to look  
10       at the bore -- Sure.

11              JUDGE BLAKE: Counsel, you mentioned  
12       that they are permitting now and you said that  
13       they're getting information later. The Region  
14       addressed in the response to comments, Section  
15       146.34(a) and (b), and the requirements of  
16       146.34(a) which need to be attained prior to  
17       permit issuance, so that's step one.

18              And then step two is the extensive  
19       information that's required in part two of the  
20       process which is going to require a full  
21       geological and hydrological analysis and  
22       characterization before EPA will approve any

1 injection. So, that relates to 146.34(b),  
2 there's information that needs to occur prior to  
3 granting approval for the operation of the site.

4 So, did you, are you challenging EPA's  
5 interpretation of Section 146.34(a)? Or are you  
6 making a different argument?

7 MR. PARSONS: I'm arguing that based  
8 on the facts of this case the lack of data at the  
9 site is such that pushing all of information off  
10 to later is not compliant.

11 For instance, as discussed in the  
12 petition at 40, the NRC transcripts have the  
13 company admitting that it's a leaky aquifer, that  
14 the borehole locations are unidentified, that the  
15 faults and fissures are unidentified.

16 And so, I think it's more than just,  
17 in this case it's more than just -- I think what  
18 I'm saying is that Powertech did not meet its  
19 burden of demonstrating ability to contain the  
20 lixiviant on the front end.

21 And EPA Region 8 has given the permit  
22 anyway, and allowed this data to come in at a

1 future time without public review. And while  
2 that may be appropriate in some instances, in  
3 this case because the data was so lacking on the  
4 front end that it can't simply be pushed off to a  
5 later time.

6 And, again, we have the admissions  
7 that the aquifers leaks and that these boreholes  
8 are conduits, but have not been identified.

9 JUDGE BLAKE: Counsel, can you point  
10 to where in the petition you addressed the  
11 Region's response to your argument regarding the  
12 adequacy of the groundwater quality data, and the  
13 fractures, and the boreholes.

14 MR. PARSONS: Well, this discussion is  
15 largely found at page 40.

16 JUDGE BLAKE: Okay.

17 MR. PARSONS: Is where we discuss the  
18 testimony.

19 I mean that, that petition from 38 to  
20 45 is where we discuss EPA's plan. And then at  
21 38 we discuss their plan to rely instead of on  
22 competent information on the front end, to rely

1 on the conceptual site model and the data  
2 packages.

3 JUDGE BLAKE: Thank you.

4 MR. PARSONS: But I would submit that  
5 because the data was so lacking on the front end,  
6 reliance on those is not sufficient.

7 JUDGE BLAKE: All right. Are there  
8 any other questions from the judges?

9 JUDGE LYNCH: Yes. I have a question.  
10 I'd like you to clarify what relief  
11 you are seeking from the Board in this case?

12 You know, in your petition, pages 34  
13 to 35 you talk about your view that the UIC  
14 regulations are inadequate, and that rulemaking  
15 is necessary to regulate the in-situ mining of  
16 uranium.

17 And then on page 52 of your petition  
18 you say what's needed is national rulemaking.  
19 And in the meantime, the permits, these permits  
20 should be withdrawn with further permitting  
21 activities enjoined to provide the Administrator  
22 an opportunity to review these matters to

1 determine how to best address EPA's ISL  
2 authorities.

3 Is that what you're seeking from the  
4 Board, an injunction of some kind?

5 MR. PARSONS: So, let me clarify.  
6 Thank you.

7 I think the short answer is I think a  
8 remand to the Agency to, to conduct the review  
9 that's necessary, including things like  
10 identifying cultural resources, identifying those  
11 boreholes, providing the information to, to ident  
12 -- to characterize the leaky aquifer.

13 On page 38, that reference to  
14 rulemaking was EPA's, national EPA's efforts  
15 under Uranium Mill Tailings Radiation Control Act  
16 to develop groundwater protections for in-situ  
17 leach uranium mines that has been abandoned.

18 So, I think that was just to inform  
19 the Board that there are significant issues out  
20 there with respect to groundwater contamination  
21 from ISL mines that EPA has been trying to get a  
22 handle on but has not been able to get those

1 regulations off the ground.

2 And so, there is a, there is a -- it  
3 was intended to advise the Board that this is an  
4 area that is, frankly, under-regulated because of  
5 -- and the track record of ISL contamination at  
6 every site that it's occurred I think speaks to  
7 that.

8 And then the second, the second  
9 example you've cited with respect to rulemaking,  
10 I think that pertains to the APA case issues we  
11 were just discussing. But if Region 8 or if EPA  
12 intends to define these, you know, to flesh out  
13 these definitions in a way that's going to -- as  
14 they have, I believe -- in a way that's going to  
15 make a precedent for all future applications,  
16 that it needs to be done through notice and  
17 comment rulemaking.

18 And so, I think this Board could --

19 JUDGE LYNCH: This says national --

20 MR. PARSONS: -- remand this --

21 JUDGE LYNCH: Your language says  
22 national rulemaking.

1 MR. PARSONS: Well, I think the Safe  
2 Drinking Water Act states that only the  
3 Administrator can develop UIC regulations.

4 JUDGE LYNCH: Thank you.

5 JUDGE BLAKE: I have one final  
6 question.

7 You state on page 9 of the petition  
8 that the Region failed to demonstrate compliance  
9 with the Safe Drinking Water Act and its  
10 implementing regulations, including 144.12,  
11 146.33(a), and 146.6(a)(2).

12 Could you identify where in the  
13 comments on the draft permit this argument was  
14 raised?

15 MR. PARSONS: Well, this came up in  
16 the motion to strike, I believe. And --

17 JUDGE BLAKE: No. This was, I'm  
18 referring to page 5 of your petition, so. It was  
19 an argument that you advanced in the petition.

20 MR. PARSONS: Well, sure. I mean, the  
21 ability to contain -- In general, those pertain  
22 to the ability, they demonstrate the ability to



1 contain the mining fluid and protect underground  
2 sources of drinking water.

3 And I think, I think in the comments  
4 those issues were squarely presented.

5 JUDGE BLAKE: Okay.

6 MR. PARSONS: Whether there was  
7 specific citation to the regulations or not, you  
8 know, it's not always a lawyer that prepares the  
9 comments.

10 And so, I think as long as it's  
11 evident from the comments that those issues were  
12 raised, it would be, it would be unfortunate if  
13 the standard was that even though it was evident  
14 that those issues were raised, a lack of specific  
15 citation to the regulation would preclude a party  
16 from pursuing those arguments.

17 And what I think we pointed out in the  
18 motion to strike, at least with respect to things  
19 like 144.12, is that in response to comments EPA  
20 looked at the comments that the Tribe submitted.  
21 And then in its response to comments it addressed  
22 144.12.

1 JUDGE BLAKE: Okay.

2 MR. PARSONS: Which, which  
3 demonstrates to me that it was self-evident, it  
4 was evident to them what we are talking about.

5 And I think that's --

6 JUDGE BLAKE: Thank you.

7 MR. PARSONS: Sorry. Go ahead. Are  
8 there any other questions?

9 JUDGE BLAKE: No. Thank you, Mr.  
10 Parsons --

11 MR. PARSONS: Thank you.

12 JUDGE BLAKE: -- for your argument.

13 And could the Clerk of the Board let  
14 us know how much additional time we used?

15 MR. CORTES: Yes, Your Honor. Twenty-  
16 three minutes were used in addition to the 20.

17 JUDGE BLAKE: Okay. Can you give the  
18 Region 13 minutes and the Tribe the remaining  
19 minutes?

20 MR. CORTES: Can you say it, can you  
21 say the last, please?

22 JUDGE BLAKE: To make it simple, let's

1 just do 11 minutes for the Region and 11. No  
2 let's do 12 minutes for the Region and 11 minutes  
3 for Powertech.

4 MR. CORTES: All right. Thank you.

5 JUDGE BLAKE: Does that get us to 23?

6 MR. CORTES: Yes.

7 JUDGE BLAKE: Excellent. Thank you.

8 Region, you may proceed.

9 MS. PERKINS: Good afternoon, Your  
10 Honors. I'm Erin Perkins from the Office of  
11 Regional Counsel. And I'll be addressing NEPA  
12 this afternoon.

13 Before we begin our argument, the  
14 Region would like to emphasize that we understand  
15 the importance to the Oglala Sioux Tribe of the  
16 project area, which is in the Black Hills.  
17 That's why the record shows we offered many  
18 opportunities to engage with the Tribe to discuss  
19 the permits.

20 The input we received from the Tribe,  
21 from the Oglala Sioux Tribe and other tribes  
22 resulted in the Region adding permit conditions

1 to enhance protections for underground sources of  
2 drinking water. But input from the tribes did  
3 not result in any information that could justify  
4 changing the final permitting decision.

5 JUDGE BLAKE: What's your response to  
6 the Tribe's argument that the precedent cited in  
7 the Region's response to comments is not  
8 controlling here?

9 MS. PERKINS: The comments on -- the  
10 precedent on NEPA?

11 JUDGE BLAKE: Yes. On NEPA. The  
12 Tribe seems to argue that the precedent that you  
13 cited is not dispositive of the applicability of  
14 NEPA.

15 What's your response to that?

16 MS. PERKINS: I think the Board has  
17 been very clear in its applying of precedents  
18 that 124.9(b)(6) has made -- makes the UIC  
19 permitting program the functional equivalent of  
20 NEPA and is not as dispositive to that question.  
21 And the Board's case law also in reviewing In re  
22 American Soda and In re Windfall Oil and Gas.

1 And that would be controlling over the permit as  
2 -- permits at issue here.

3 JUDGE BLAKE: Proceed.

4 MS. PERKINS: The Board's review of  
5 the petition's claim that the Region violated the  
6 NEPA functional equivalence doctrine by not  
7 addressing detailed NEPA requirements. The  
8 petition obfuscates the requirements of  
9 functional equivalence by referring to NEPA  
10 requirements.

11 The case law makes clear that  
12 following the Safe Drinking Water Act  
13 requirements alone is sufficient as a matter of  
14 law.

15 Further, Region 8 undertook an orderly  
16 environmental review and robust public  
17 participation process prior to issuing the  
18 permits, consistent with the functional  
19 equivalence doctrine and EPA's UIC permitting  
20 program.

21 Review should be denied because the  
22 petition did not address EPA's response to

1        comments regarding long-standing case law finding  
2        that the Safe Drinking Water Act and the UIC  
3        permit program are the functional equivalent of  
4        NEPA, and no need for NEPA compliance was  
5        required prior to issuing the permits.

6                The petition does not identify how the  
7        Region's response to comments at No. 264, which  
8        can be found at Bates 000316 to 320, was clearly  
9        erroneous or otherwise warrants review.

10               Substantively, the petition does not  
11        grapple with this long-standing case law nor the  
12        regulation codifying the functional equivalence  
13        doctrine which exempts compliance with NEPA for  
14        actions taken pursuant to the Safe Drinking Water  
15        Act and EPA's UIC regulations.

16               Courts have consistently and broadly  
17        exempted certain EPA actions from procedural  
18        requirements of NEPA through this doctrine.

19               JUDGE AVILA:    Excuse me.    Do you have  
20        a view as to which NEPA regulations apply here  
21        and -- and/or does it matter?

22               MS. PERKINS:    We do not believe that

1 the NEPA regulations apply here. The Safe  
2 Drinking Water Act --

3 JUDGE AVILA: I'm sorry. If NEPA were  
4 to apply, which, which year of the regulations do  
5 we apply?

6 MS. PERKINS: If NEPA were to apply,  
7 if there's a --

8 JUDGE AVILA: Or does it matter?

9 MS. PERKINS: -- time -- I don't, we  
10 do not believe that it matters which NEPA  
11 regulations apply here because the Safe Drinking  
12 Water Act and the UIC regulations are the  
13 functional equivalent of NEPA.

14 As the 8th Circuit found in Western  
15 Nebraska Resources Council v. EPA, they found  
16 that the Safe Drinking Water Act is the  
17 functional equivalence. And 124.9(b)(6), as the  
18 Board has repeatedly upheld, has found that the  
19 UIC regulations are dispositive of -- sorry.  
20 That 124.9(b)(6) is dispositive on the question  
21 of the UIC program's functional equivalence to  
22 NEPA.

1                    Courts have reasoned that EPA actions  
2                    under these statutes are functional equivalents  
3                    to be required under NEPA because they consider  
4                    environmental impact and provide an opportunity  
5                    for public involvement.

6                    In Western Nebraska Resources Counsel  
7                    v. EPA, the U.S. Court of Appeals for the 8th  
8                    Circuit, like was discussed, found the Safe  
9                    Drinking Water Act is the functional equivalent  
10                  of NEPA and, therefore, formal NEPA compliance is  
11                  not required when EPA takes action pursuant to  
12                  the Safe Drinking Water Act.

13                  In doing so, the court agreed that the  
14                  many circuits that have held that EPA does not  
15                  need to comply with the formal requirements of  
16                  NEPA in performing its environmental protection  
17                  functions under organic legislation that mandates  
18                  specific procedures for considering the  
19                  environment that are the functional equivalents  
20                  of the impact statement process.

21                  Further, as discussed in the Region's  
22                  response to comments, the EPA consolidated



1        permitting regulations, as we just discussed, at  
2        40 C.F.R. 124.9(b)(6), specifically codified the  
3        functional equivalence doctrine and exempts  
4        certain EPA permitting actions, including the  
5        issuance of UIC permits from NEPA.

6                The Board addressed this regulation  
7        for the first time in the UIC permitting context  
8        in *In re American Soda*. After discussing the  
9        functional equivalence doctrine, Board and court  
10       case law on this issue, the Board found that the  
11       regulation is dispositive regarding the UIC  
12       permit program's functional equivalence to NEPA.

13               The Board affirmed this position in  
14       two subsequent cases, *In re Beeland Group* and *In*  
15       *re Windfall Oil and Gas*.

16               The petition does not explain why  
17       Region 8's response to comments discussing these  
18       EAB cases and the regulation is clearly erroneous  
19       or otherwise warrants review.

20               In addition, the petition does not  
21       address these cases substantively. The petition  
22       simply notes the existence of 40 C.F.R.

1 124.9(b)(6), without addressing that the EAB  
2 expressly held that this regulation is  
3 dispositive on the question of UIC permit  
4 program's functional equivalence to NEPA.

5 Therefore, the Board should deny  
6 review of Petitioner's NEPA functional  
7 equivalence claim.

8 JUDGE AVILA: What I understood Mr.  
9 Parsons to be arguing is that there's aspects of  
10 things that you would have looked at under NEPA  
11 that apply that you didn't do in the context of  
12 this UIC permitting process, therefore, it can't  
13 be the functional equivalent.

14 What's your response to that?

15 MS. PERKINS: Our response is that the  
16 functional equivalence doctrine doesn't require  
17 literal compliance with all the aspects of NEPA,  
18 it requires a functional equivalence.

19 And so, the Board and the courts have  
20 already determined that the process under the  
21 Safe Drinking Water Act and in the UIC permitting  
22 regulations is the functional equivalent. And

1       so, therefore, we don't need to do -- follow each  
2       detailed part of the NEPA regulations and  
3       requirements for environmental impact statements  
4       under NEPA.

5               JUDGE AVILA:   So, let me just make  
6       sure I understand.

7               Almost as a matter of law under the  
8       Board cases and the 8th Circuit cases, the UIC  
9       program has been determined to be, irrespective  
10      of the facts underlying each of those cases, as a  
11      matter of law it's been determined that the UIC  
12      program is a functional equivalent?

13              MS. PERKINS:   Correct.   The Board has  
14      determined that the UIC permitting program is the  
15      functional equivalent.

16              And here, also, review should also be  
17      denied because the Region provided many  
18      opportunities for public involvement, and  
19      undertook an orderly environmental review process  
20      prior to issuance of the permits consistent with  
21      the NEPA functional equivalence doctrine.

22              JUDGE LYNCH:   Counsel.

1 MS. PERKINS: Yes?

2 JUDGE LYNCH: I had a question about  
3 the law. And that is, what's the significance in  
4 these case discussions and in the regulations  
5 when they use the term, formal requirements?

6 It says that EPA doesn't have to  
7 comply with the formal requirements.

8 What's the significance of that  
9 terminology? What are they really talking about?

10 MS. PERKINS: I think in the  
11 functional equivalence doctrine it's talking  
12 about the environmental impact statement. And  
13 then under the functional equivalence doctrine,  
14 the formal requirements of that, the impact  
15 statements don't need to be complied with but the  
16 Agency and the Region does need to do an orderly  
17 environmental review and provide for public, a  
18 public participation. And the Region did that  
19 here.

20 JUDGE LYNCH: And then I had a  
21 question and, again, putting aside whether NEPA  
22 applies.

1                   In the cumulative effects section  
2                   under EIS in NEPA, in the regulations 1502, prior  
3                   to July 2020 there was a definition, robust  
4                   definition of cumulative effects that was removed  
5                   in July of 2020 and during the time when the  
6                   Region made its decision.

7                   But it's your position that the  
8                   cumulative effects analysis that you did under  
9                   the Safe Drinking Water Act, 144.33, that that  
10                  would be the functional equivalent of the earlier  
11                  NEPA regs on cumulative impacts?

12                  MS. PERKINS: So, it is a different  
13                  standard. However, so under the -- under 144.33  
14                  the scope of the cumulative impacts analysis is  
15                  to look at the addition of wells, operate --  
16                  drilling and operation of wells, which is a  
17                  different scope than the NEPA regulations.

18                  However, again, the Board had  
19                  determined that -- the regulation was promulgated  
20                  in 1980 and the Board had determined that the UIC  
21                  permitting program was the functional equivalent  
22                  of NEPA and we didn't need to comply with the

1 NEPA regulations, we needed to comply with the  
2 UIC regulations.

3 JUDGE LYNCH: All right. Thank you.

4 MS. PERKINS: The Region in no way  
5 committed any clear error or took action  
6 otherwise warranting review.

7 The Region engaged in a public review  
8 process for several years prior to issuing the  
9 UIC permits, including multiple public comment  
10 periods, public information meetings, and public  
11 hearings held at different locations in 2017 and  
12 2019, as well as engaging in a substantial,  
13 nearly five-year tribal consultation process.

14 The Region undertook an orderly  
15 environmental review process prior to issuing the  
16 UIC permits, which included preparing a  
17 cumulative effects analysis pursuant to 40 C.F.R.  
18 144(c)(3) that considered the impacts to many  
19 resources.

20 EPA is not required to comply with the  
21 NEPA regulations, as we just discussed, including  
22 for cumulative impact. EPA is only required to

1       comply with the Safe Drinking Water Act UIC  
2       regulations. Therefore, the Board should only  
3       evaluate the Region's compliance with the Safe  
4       Drinking Water Act UIC regulations to meet NEPA  
5       functional equivalence.

6               JUDGE BLAKE: I actually had a few  
7       questions about the 144.33(c)(3). Would you be  
8       addressing those or will your colleagues be  
9       addressing that?

10              MS. PERKINS: My colleague Lucita  
11       Chin, if you have specific questions about that  
12       analysis, is probably better, the better person  
13       to answer.

14              In addition to the cumulative effect  
15       analysis prepared under the UIC regulations,  
16       Region 8 complied with the detailed regulatory  
17       requirements under 40 C.F.R. Parts 144 and 146,  
18       including a detailed technical review to issue  
19       the UIC permits that are protective of USDW.

20              The substantial administrative record  
21       demonstrates that Region also prepared additional  
22       analyses and considered many other documents

1 regarding environmental issues prior to taking  
2 action on the UIC permits.

3 Given the foregoing, no additional  
4 environmental analysis is required and the Board  
5 should deny review of the Petitioner's NEPA  
6 functional equivalence claims.

7 JUDGE BLAKE: Thank you, counsel.

8 MS. PERKINS: Thank you.

9 MR. BOYDSTON: Good afternoon, Your  
10 Honors, again. Mike Boydston here to discuss  
11 NHPA Section 110 on behalf of the Region.

12 The Board has raised questions about  
13 the threshold procedural requirements related to  
14 issue preservation and the standard of review. I  
15 would refer to our briefing on that subject in  
16 our primary response and our motion to strike the  
17 results of relevant material in Powertech's  
18 briefing.

19 Two additional points that I would  
20 raise.

21 First, as the Board has already found,  
22 it is not clear on the face of the petition



1       whether there is even an assertion of a violation  
2       as to Section 110. And if it is not clear on the  
3       face of the petition, then Petitioner has not met  
4       the obligation to clearly set forth the basis for  
5       review.

6                     My second point -- should I pause,  
7       Your Honor?

8                     JUDGE BLAKE: Pause for just a minute.  
9       We're having some technical issues.

10                    (Pause.)

11                    JUDGE BLAKE: Please proceed.

12                    MR. BOYDSTON: My second point about  
13       the threshold issues is that I find it notable  
14       that in the Tribe's response to the Board's March  
15       2023 order to identify issues remaining for  
16       review Petitioner did not mention Section 110.

17                    These threshold failures are fatal to  
18       Petitioner's Section 110 argument, but it also  
19       fails on the merits. Petitioner relies on the  
20       language to the effect that Section 110 requires  
21       consideration of implementation of Section 106 to  
22       the fullest extent possible to function. And

1 argues that this makes Section 110 function as a  
2 sort of exclamation point on Section 106.

3 But looking at the actual cases that  
4 use that language and reading the context for  
5 that statement doesn't support that view of  
6 Section 110.

7 In the Blanck case, which is the  
8 original source of the quotation, National  
9 Historic Trust -- National Trust for Historic  
10 Preservation versus Blanck, the court starts out  
11 by talking about the limited nature of Section  
12 110.

13 And it says in the course of finding  
14 that the Corps of Engineers was -- sorry. That  
15 the U.S. Army was not obligated to undertake  
16 activities related to Section 110, the court  
17 said, Section 110 is read in conjunction with  
18 Section 106, and says that it is those two in  
19 conjunction, the statute as a whole and the case  
20 law, did not require Walter Reed, the Army  
21 Medical Center, to undertake any preservation  
22 beyond what was necessary to comply to the

1 fullest extent possible with and in the spirit of  
2 the Section 106 consultation process and with its  
3 own historic preservation plan.

4 The court specifically said that  
5 Section 106 is the main thrust of the NHPA and  
6 that the obligation, once triggered, is  
7 procedural in nature. Section 110 itself does  
8 not require anything more.

9 The second case that used that fullest  
10 extent possible language is the Oglala Sioux  
11 Tribe vs. The Corps of Engineers. And in that  
12 case the court referred to that fullest extent  
13 possible language and then found that there was,  
14 nonetheless, no plainly prescribed duty to act  
15 created by the statute on behalf of the federal  
16 agency there.

17 One notable thing about both of those  
18 cases is that they concern the Agency management  
19 of federally-owned properties, which is a large  
20 part of Section 110 that is not really relevant  
21 here. But there is more generally descriptive  
22 relevant discussion in Section 110, and that's

1       why I think it's worth looking at them.

2               JUDGE AVILA:  If Petitioner were right  
3       that there was a Section 110 obligation here, I  
4       take it the NRC would have had that obligation as  
5       well.  Is that correct?

6               MR. BOYDSTON:  To the extent I  
7       understand what Petitioner is saying about what  
8       obligation Section 110 would create, yes, Your  
9       Honor.

10              But we are aware of no court that has  
11       said Section 110 requires additional consultation  
12       and review procedures, on top of the existing  
13       detailed Section 106 consultation and review  
14       procedures, which both the NRC and EPA have been  
15       held to have satisfied.

16              As to the specific failures that  
17       Petitioner has alleged in connection with this  
18       provision, I've heard consultation and survey-  
19       related items.

20              And the Board has already upheld EPA  
21       Section 106 compliance, including, as a part of  
22       that, our reliance on the NRC's consultation

1 process and its conclusions regarding whether a  
2 survey was necessary in addition to the cultural  
3 resources identification work that had been done.

4 Granting review here, it is clear we'd  
5 effectively allow Petitioner to relitigate the  
6 Section 106 arguments that the Board has already  
7 decided.

8 In conclusion, an argument that's  
9 based on a passing reference, as the Board has  
10 termed it, cannot satisfy the threshold  
11 requirement for review.

12 And even if it did, Section 110 offers  
13 no basis to find the Region's actions clearly  
14 erroneous, or otherwise warranting review.  
15 Therefore, the Board should deny review as to  
16 NHPA Section 110.

17 JUDGE BLAKE: Thank you, Counsel.

18 MR. BOYDSTON: Thank you.

19 MS. CHIN: Good afternoon, Your  
20 Honors. Lucita Chin with Region 8. I'm going to  
21 start first by addressing the Safe Drinking Water  
22 Act issues.

1           Petitioner here raises two distinct  
2           but very similar arguments. The first, that the  
3           Region had inadequate baseline quality data prior  
4           to issuance of a permit, and the second, that the  
5           Region had inadequate hydrogeological analysis.

6           JUDGE BLAKE: Can I stop you there,  
7           Counsel? I'd like to go back to -- Section  
8           144.33(c)(3).

9           The Tribe argues, on page 28 of its  
10          petition, that the disposal of waste is a  
11          necessary activity that results from the  
12          construction and operation of permitting  
13          injection wells, and thus must have been  
14          addressed under 144.33(c)(3). What's your  
15          response to that argument?

16          MS. CHIN: So, the Region did an  
17          extensive cumulative effects analysis. It was  
18          172 pages. In doing so, we actually reviewed the  
19          NRC's Supplemental EIS that was done for this  
20          project as well.

21          We did address some waste issues that  
22          were more immediate. We did our effects analysis

1 on that immediate 20-mile area, and that covered  
2 the furthest environmental effects of the  
3 drilling and operation of those additional wells.

4 JUDGE AVILA: I'm sorry, maybe I  
5 missed a nuance and I apologize. But I thought  
6 that the Tribe was focused on the disposal of  
7 waste being a necessary activity. And I guess my  
8 question is, what is your response to that? That  
9 you did that in your cumulative analysis?

10 MS. CHIN: No. I think, specifically  
11 if you're referring to the White Mesa Mill  
12 comments that they made, that waste is too far  
13 out in time and not localized to the effects of  
14 the drilling and operation of the well. So, it  
15 needs to be transported to a site in Utah.

16 The other thing about that issue is  
17 that Powertech, at the time that we issued the  
18 permits, didn't have an agreement. So, while it  
19 was possible that they would send their waste  
20 there, it was not at that time probable.

21 JUDGE BLAKE: And in your analysis of  
22 144.33(c)(3), the Tribe also talks about how the

1       Region failed to account for other existing and  
2       foreseeable projects in the location, or  
3       additional projects near the Dewey project site.

4               Were those included in your analysis  
5       under 144.33(c)(3)? And if no, why not?

6               MS. CHIN: No, we were not aware of  
7       any specific plans at the time when we were doing  
8       our review of the permit. So, I believe that  
9       they got that information from filings -- they,  
10      being the Tribe -- got that information from  
11      filings before the SEC, and these documents  
12      discuss potential things that the company might  
13      want to do in the future.

14              But there's no proposal within the  
15      actual permit application to EPA, as to whether  
16      or not those are even going to be done.

17              And then furthermore, if those are, in  
18      the future, done, of course EPA would have to  
19      modify a permit to accommodate for those  
20      additional wells.

21              And at that time, then we would look  
22      at the cumulative effects again in a



1 modification, and determine whether or not  
2 effects are acceptable at that time.

3 Petitioner's arguments on the adequacy  
4 of the baseline water quality data fail to  
5 address key points from the Region's response to  
6 comment.

7 Throughout its argument, Petitioner  
8 relies on a false premise, that Powertech had an  
9 obligation to provide a complete baseline  
10 analysis prior to issuance of a permit.

11 JUDGE LYNCH: Counsel?

12 MS. CHIN: Yes.

13 JUDGE LYNCH: The way I read  
14 Petitioner's argument, at least in part, is  
15 they're saying, well, without that data, both the  
16 Region and Powertech are not able to comply with  
17 40 C.F.R. 144.12(a), the obligation to ensure  
18 there's no fluid movement before a permit is  
19 issued. So, what's your response to that?

20 MS. CHIN: So, the regulations in  
21 144.12(a) is the general endangerment standard.  
22 And this standard, in general, it's a prohibition

1 on fluid movement from injection activity.

2 And it applies to an injection  
3 activity throughout the lifetime of that  
4 injection activity, and not just at the  
5 application stage.

6 So, what the Petitioner is arguing is  
7 that the applicant has a burden in the beginning  
8 to make all these showings that they're not going  
9 to have a violation in the future, which isn't  
10 really possible.

11 144.12(a) is really a fallback. And  
12 it is an obligation that the owners and operators  
13 always have. I think that the real issue is that  
14 the Petitioner neglects the whole idea that  
15 there's going to be a permit in place and it's  
16 that permit, done in compliance with the UIC  
17 regulations, that is going to prevent the  
18 migration of fluids into USDWs.

19 In fact, the language from 144.12(a)  
20 is written into both permits as a condition.

21 JUDGE BLAKE: Isn't the Tribe arguing  
22 you're relying on data from 2007 to 2009. How is

1       that adequate? Isn't that the Tribe's position?

2               MS. CHIN: I think it is. And it is  
3       sufficient because we have a general idea of the  
4       constituents that are in the formation.

5               But what we're really looking for once  
6       the permit is issued and, if you're talking  
7       specifically about the baseline water quality  
8       data, that data is going to go to populate a  
9       conceptual site model, which is going to predict  
10      whether or not those fluids will laterally leave  
11      the area into a USDW.

12              So, it's not necessary to the  
13      protection of USDWs to have that information  
14      prior to issuance of the permit.

15              JUDGE BLAKE: I just had one follow-up  
16      on the issue of the boreholes. The Tribe  
17      discusses the boreholes at great length in their  
18      petition. And I wanted to know how the Region  
19      responds to the Tribe's reply at page 19, where  
20      the Tribe argues that Section 146.34(a)(2) and  
21      (3) specifically require that the Region review  
22      data on historic boreholes prior to issuance of

1 the permit.

2 So, the Tribe is focused on the fact  
3 that even looking at 146.34(a), which the Region  
4 is saying that's what we need to look at prior to  
5 issuing a permit, the Tribe is saying that was  
6 inadequate, at least with regard to 146.34(a)(2)  
7 and (3) and the boreholes. What's your response  
8 to that?

9 MS. CHIN: Sure. So, Region 8  
10 responded in a very specific and detailed manner  
11 in Response 4 on a lot of these hydrogeological  
12 issues that the Tribe's expert raised.

13 I would say that under 40 C.F.R.  
14 146.34(a)(2), that Powertech complied when they  
15 provided a map of known boreholes or drill holes,  
16 and that's in the Class III Fact Sheet at page  
17 40.

18 And they complied with 146.34(a)(3) by  
19 providing us a table of known drill holes, and  
20 that's Attachment U to the Region's response  
21 brief.

22 I'm not certain, but I believe that

1 the Petitioner's discussing this borehole, drill  
2 hole data, and I think he's referring to well  
3 logs that Powertech had. And that was something  
4 that was brought up in the NRC process which we  
5 were not a part of.

6 Those wells logs are not required to  
7 be submitted under 146.34(a). And while they did  
8 provide a handful of them for us, they were not  
9 for the purpose of looking for hydrogeological  
10 issues, it was for the purpose of determining  
11 whether or not they met the commercial  
12 producibility.

13 So, those well logs are required by  
14 the permit to be submitted when they define those  
15 well fields. They will be required to provide  
16 those well logs as part of those data packages in  
17 Part 2, Section H. And those are just one  
18 component of the things that they must provide to  
19 EPA.

20 JUDGE BLAKE: One follow-up again on  
21 the hydrogeological analysis in the area of  
22 review.

1                   The Tribe stated that its expert, Dr.  
2 Moran, opined on the Region's conclusion that the  
3 production zone is hydraulically isolated from  
4 the surrounding aquifers.

5                   How did you respond to that claim  
6 regarding Dr. Moran's testimony?

7                   MS. CHIN: I believe that it was in  
8 Response 4. And the information that our program  
9 looked at confirmed the confining layers; that  
10 there were confining layers in the area.

11                  Again, they will need to do more  
12 detailed analysis once the permit is issued, and  
13 through their pump tests.

14                  JUDGE BLAKE: And with regard to the  
15 Tribe's claim that the permit requires a full  
16 characterization of geologic and hydrologic  
17 information, and it will be provided to the  
18 Region for analysis prior to authorizing  
19 injection, but the Tribe contends that it is  
20 being denied the opportunity to comment on that  
21 data. Can you address that argument?

22                  MS. CHIN: Sure. Of course, I would

1 first say that the regulations really provide for  
2 and explain that this is the process.

3 And I would say that the Petitioners  
4 and commenters have the ability to review those  
5 permits. Those permits are very detailed, and  
6 what the tests had to show before EPA would  
7 authorize injection.

8 So, if they had concerns with the way  
9 we were doing our testing, and whether the  
10 conditions would allow for migration of fluids  
11 out of the USDW, they could have made it. They  
12 could have made those comments.

13 JUDGE AVILA: Can I ask, does the  
14 Region believe that only communications that  
15 occurred after the submission of the 2013 revised  
16 permit application, those are the only things  
17 that are required to be in the administrative  
18 record?

19 MS. CHIN: Yes. I mean, I would say  
20 that the things that the Region actually  
21 considered, and any information that we received,  
22 would be considered, if that was information that

1 was informing a permit decision.

2 The emails that you refer to are  
3 really just communications back and forth, and  
4 they didn't provide information to EPA for  
5 purposes of a permit evaluation. It was to  
6 provide them technical assistance to help them  
7 write the application.

8 JUDGE AVILA: Well, where's the line  
9 though on that? I mean, when you're giving  
10 someone technical information about what to  
11 include in their permit application, I take the  
12 Tribe's point to be that you're therefore setting  
13 the universe of information that you're going to  
14 get.

15 Therefore, if not, just like you said,  
16 send it to X address, you are kind of, in the  
17 Tribe's view I think, setting the ground rules  
18 for what it was you were going to get. And that  
19 doesn't really necessarily, to them, sound like  
20 just technical help. It sounds substantive, I  
21 think.

22 MS. CHIN: Well, turning to what the



1       Petitioner raised in his oral argument with  
2       regard to the area of review document itself,  
3       he's referring to these definitions that were in  
4       that document.

5               And if you look at that document,  
6       those definitions are citations. They are the  
7       actual language from those regulations. They're  
8       not definitions that we created.

9               They were, for the purpose of  
10      discussion, to let Powertech know what regulatory  
11      provisions that we would be looking at in this  
12      discussion.

13              JUDGE LYNCH: But Document 30 says  
14      you're providing the criteria that you're going  
15      to use.

16              MS. CHIN: So, but the definition --  
17      I'm sorry, I'm going to turn to it here. The  
18      definitions of the area of review in here, the  
19      zone of endangering influence, the criteria for  
20      exempted aquifers, those all come straight from  
21      the regulatory criteria in 144 and 146. The  
22      other thing I would point out --

1 JUDGE AVILA: I'm sorry, I'm sorry.  
2 So, are you saying that the text on page 4 and 5  
3 of Attachment 30 to the permit, those are just  
4 block quotes of the regulations, is what you're  
5 saying.

6 MS. CHIN: Yes.

7 JUDGE AVILA: But I think it's what  
8 comes before page 4 and 5, where the intent of  
9 the area of review in the regulations, where  
10 there's a characterization of the regulation, I  
11 think that's what the Tribe is --

12 MS. CHIN: Sure. I would say that the  
13 regulation itself at 146.6 allows for a  
14 discussion with industry, when we're talking  
15 about the area of review. Because they're the  
16 ones that have the most information about those  
17 operations in the fields.

18 JUDGE LYNCH: I'm not asking you about  
19 whether or not you can have discussions. What  
20 I'm interested in is it looks like it was a back-  
21 and-forth discussion and you're talking about how  
22 you're actually going to apply the regs.

1                   And it's based on information you're  
2                   getting from Powertech. I mean, that was  
3                   discussed -- actually, Powertech had a footnote  
4                   in their response brief. I think it's footnote  
5                   7.

6                   And I think part of what the  
7                   Petitioner is saying is, it didn't look like a  
8                   one-way street here, one way conversation. It  
9                   was very much two ways. And so, I would ask why  
10                  you wouldn't consider that.

11                  MS. CHIN: To my knowledge, while it  
12                  may have been two-way conversation obviously in  
13                  the email conversations, it didn't include any  
14                  substantive information about the application and  
15                  the things that we would be looking at within the  
16                  regulations, and what we would have to consider  
17                  for purposes of evaluating a permit.

18                  So, what I'm familiar with is just  
19                  questions back and forth. I mean, the dialogue  
20                  in the emails didn't include anything site-  
21                  specific about that site for us to consider.

22                  JUDGE LYNCH: Well, this one email

1       that's quoted on page 30 in Powertech's response  
2       brief, is talking about considering your permit  
3       application and how it's going to change, making  
4       kind of the criteria.

5               MS. CHIN: So, ultimately, if it's  
6       about that area of review, the area of review in  
7       the permit application, we review that, and we  
8       point that out in the fact sheet.

9               So, we explain how we determine the  
10      area of review in that document. It's a very  
11      detailed explanation over many pages, that talks  
12      about the area of review and the things that we  
13      see in it.

14              And while Petitioner claims that the  
15      concern is about what's in the area of review,  
16      while they make comments about the features  
17      inside the area of review, they never dispute or  
18      have any comments about the appropriateness of  
19      the area of review, which is an area that the  
20      Region is looking at for potential fractures, or  
21      boreholes, or things that might be breaches in  
22      the confinement zone.

1 JUDGE BLAKE: Counsel, but Attachment  
2 30 to the petition does -- it's called Discussion  
3 of Zone of Influence, Area of Review, and the  
4 Aquifer Exemption Boundary for the Class III  
5 Injection Wells Used for the In-Situ Leaching of  
6 Uranium.

7 And it is marked draft. There is a  
8 draft watermark on the document. Is it your  
9 contention that this document is not part of the  
10 administrative record?

11 MS. CHIN: That's correct.

12 JUDGE BLAKE: Okay. But wasn't the  
13 document submitted as an attachment to the  
14 Tribe's 2017 comments, and thus, pursuant to the  
15 regulations, it would be a part of the  
16 administrative record?

17 MS. CHIN: Yes, you are correct  
18 actually. Yes.

19 JUDGE LYNCH: And so then, you also,  
20 in your response to comments, say that you didn't  
21 consider Attachment 30 or Attachment 29. But  
22 aren't you supposed to consider comments?

1 MS. CHIN: Yes. Of course, we  
2 considered comments. This one, since it was our  
3 own discussion document, of course we looked at  
4 it. But again, to make a permitting decision, it  
5 didn't give us information that would be  
6 necessary for the permit evaluation itself.

7 So, you're right, we did consider it  
8 as a comment.

9 JUDGE LYNCH: But in your response to  
10 comments, you used the words both, we didn't  
11 consider it or rely on it. What's the  
12 distinction you're making there?

13 MS. CHIN: So, the distinction is that  
14 while we considered it as a comment -- and, I  
15 mean, it came in to us --

16 JUDGE LYNCH: So, you didn't consider  
17 it. Twice, in two different places, and you also  
18 say that in your response brief. You use both  
19 words.

20 MS. CHIN: Yes, Your Honor. I would  
21 say that that was an oversight on behalf of  
22 Region 8 that we had thousands and thousands of

1        comments. And when we wrote the response brief,  
2        perhaps we did not remember that that was in the  
3        comments.

4                JUDGE LYNCH: And you're saying that  
5        the permit writer did not consult or look at the  
6        criteria, any information in Attachment 30?

7                MS. CHIN: No, we're not saying that.  
8        Of course she did. Yes.

9                JUDGE LYNCH: What's the status of  
10       these documents?

11               MS. CHIN: The status of this  
12       document?

13               JUDGE LYNCH: Document 30, Attachment  
14       30 to the petition.

15               MS. CHIN: There's no status, as far  
16       as this document went.

17               JUDGE LYNCH: And by that you mean you  
18       gave it to Powertech?

19               MS. CHIN: By that, it was discussed  
20       with Powertech and shared with Powertech at the  
21       time. Correct.

22               JUDGE LYNCH: Anyone else? Any other

1 members of the mining community?

2 MS. CHIN: I am unaware of any other.

3 JUDGE LYNCH: You know, the other  
4 question I want to ask is that in your response  
5 to comments, both 183 and 184, the Region says --  
6 and this is in the response to comments -- that  
7 you did not have discussions with the mining  
8 community.

9 But if you look at Attachment 29,  
10 Roman numeral V, it seems to say the opposite.  
11 It says you consulted or met with a number of  
12 mining companies. And the Petitioner points that  
13 out. How do you reconcile those different  
14 statements?

15 MS. CHIN: So, I would say that the  
16 document that he got via FOIA that you reference,  
17 number one was gotten through the FOIA, was  
18 probably a deliberative document, it was  
19 internal.

20 It was definitely not to be in this  
21 record, because it didn't have specific  
22 information about Powertech and we didn't have --



1 I'm sorry, it was deliberative and it didn't have  
2 information specific to this permit application.

3 I think the Region has discussions at  
4 certain levels that are not always discussed or  
5 shared amongst everyone in the agency.

6 They have meetings with NGOs, they  
7 have meetings with industry, and all I can say is  
8 that it's possible that they had conversations  
9 with the mining industry there.

10 JUDGE LYNCH: Thank you.

11 JUDGE BLAKE: Counsel, the 2013 Class  
12 III application is in the administrative record.

13 Can you point to where in the  
14 administrative record the original application  
15 that Powertech submitted? It's not clear from  
16 the record whether that was at the end of  
17 December 2008 or in January of 2009.

18 But is that application part of the  
19 administrative record? And did you rely on any  
20 information in that application?

21 MS. CHIN: We did not. The final  
22 application in 2013 supplanted the one that they

1 submitted before.

2 JUDGE LYNCH: I have a question. The  
3 Petitioner reads Region 8's brief and their  
4 response to comments, as saying you seem to have  
5 hard-and-fast rule that in terms of the  
6 administrative record, anything prior to the  
7 final application -- so here, we're talking about  
8 2013 -- that should not, will not, be in the  
9 administrative record.

10 And maybe I'm overstating it or  
11 misstating it. But assume for the moment that  
12 that's how he's reading your statements. Is that  
13 Region 8's position?

14 MS. CHIN: I don't think so. I think  
15 that if there were things that we did consider --  
16 if there were communications, or if that prior  
17 application was relevant anymore -- that we would  
18 have it in the record.

19 But the truth is that that was deemed  
20 to not be technically sufficient, which is why  
21 they had to go back to include more information,  
22 and provide more and better information, to be

1 deemed an adequate application that EPA would  
2 review and put forward.

3 JUDGE LYNCH: Thank you.

4 JUDGE BLAKE: For the Petitioner's  
5 2017 comments and the attachments, were those  
6 part of the record available for the public to  
7 review during the 2019 comment period on the  
8 draft permit?

9 MS. CHIN: They were. Because they  
10 were included in the 2017 comments, the record  
11 was available during the 2019 comment period  
12 time.

13 JUDGE BLAKE: Okay, thank you for  
14 clarifying that.

15 MS. CHIN: In conclusion, Your Honors,  
16 Petitioner has not met the standard of review on  
17 any of the issues raised in the petition.  
18 Therefore, Region 8 urges that the Board deny  
19 review.

20 JUDGE BLAKE: Thank you very much.

21 MS. CHIN: Thank you.

22 JUDGE BLAKE: Thank you. Counsel for

1 Powertech?

2 MR. HILL: Good afternoon. I'm Jason  
3 Hill, here on behalf of Powertech. I appreciate  
4 the opportunity to be here this afternoon.

5 One of the things that I wanted to  
6 address, in just listening to the questions that  
7 we had and start with, are the APA portions and  
8 what belongs in the administrative record.

9 I think it's important to keep in mind  
10 the standard for what belongs in the  
11 administrative record, being anything considered  
12 directly or indirectly by the administrative  
13 agency in making its decision.

14 And that's a different standard than  
15 you have for a FOIA request which is responsive  
16 to the request itself.

17 There's going to be a presumption of  
18 regularity that the agency put together the  
19 administrative record properly. And I don't  
20 believe that the Petitioner here has overcome  
21 that presumption of regularity.

22 And what the agency put in place, or

1 put in the administrative record, is what is  
2 proper here.

3 On the NHPA claims, I think this can  
4 be taken very simply to just summarize, the  
5 agency complied with NHPA Section 106 obligations  
6 by designating NRC as the lead agency.

7 Under 36 C.F.R. 800.2(a)(2), the DC  
8 Circuit has held that NRC satisfied its NHPA  
9 obligations.

10 This Board has found that the Tribe's  
11 NHPA Section 106 claim is no longer at issue, and  
12 therefore denies any aspects of that petition.

13 To the extent that they're trying to  
14 create something new for the Section 110  
15 argument, that's found in the petition at 22.  
16 There's no specific allegation of a 110 violation  
17 there.

18 These mere allegations of error are  
19 insufficient to support review by this Board.  
20 And so, we think that the NHPA arguments fail.

21 With respect to the NEPA claims, the  
22 plain text of 40 C.F.R. 124.9(b)(6) kind of

1 governs here.

2 The UIC permits are not subject to the  
3 EIS provisions, and we believe that that's kind  
4 of -- were dispositive of this issue.

5 I'm going to wrap it up and let my  
6 colleague address the Safe Drinking Water Act  
7 provisions.

8 JUDGE AVILA: Before you do, can I  
9 just ask you about, on the administrative record  
10 point, so in footnote 7 you point to, I think  
11 it's an email exchange, and you talk about how  
12 they are preliminary in nature, the discussions  
13 that were being had.

14 But it's talking about a draft  
15 guideline. So, if those guidelines were, quote,  
16 final, at the time of your permit application,  
17 would they be part of the admin record?

18 MR. HILL: I'm sorry, what --

19 JUDGE AVILA: If it's talking about a  
20 draft form and a draft checklist that permit  
21 applicants will use -- and you characterize those  
22 as being of a preliminary nature.

1 MR. HILL: Right.

2 JUDGE AVILA: And I guess my question  
3 is, is it the preliminary nature that makes them  
4 not part of the administrative record, in your  
5 view?

6 MR. HILL: I think, one, it is  
7 preliminary. I think also, it's whether the  
8 agency considered it. And at that preliminary  
9 stage, it doesn't sound like they considered it.

10 And I think when you look at the  
11 response to comment 185, they talk about that  
12 they were providing technical assistance, they  
13 weren't acquiring the information for making the  
14 decision at issue here.

15 JUDGE BLAKE: I had an additional  
16 question on that, Judge Avila. What are the  
17 guidelines that are being referenced in your  
18 brief at footnote 7?

19 MR. HILL: I'm sorry.

20 JUDGE BLAKE: What are the guidelines  
21 that are being referenced in your brief at  
22 footnote 7, page 30? What are the guidelines

1       that you're referencing?

2               MR. HILL: I'm sorry, I don't have the  
3       brief in front of me. I can't answer that.

4               JUDGE AVILA: It says, I'm just  
5       concerned that the guidelines in the making were  
6       not as clear as they really needed to be for the  
7       first permit application. That's the last  
8       sentence.

9               There's a quoted parenthetical -- "I  
10      have been working on creating permit application  
11      guidelines for Class III ISL wells over the last  
12      few months.

13              The guideline have been taking shape  
14      as I talked with you about all about different  
15      things. I am just concerned that the guidelines  
16      in the making were not as clear as they really  
17      needed to be for the first permit application."

18              So, I think the question is, what is  
19      that application guidelines, or what is that?

20              MR. HILL: I'm not -- I don't know.  
21      I'm sorry.

22              JUDGE LYNCH: And then can you also,



1 on that same page -- page 30 of your response  
2 brief -- you're quoting the Region and their  
3 response to comments, where they say, these  
4 communications are for the purposes of providing  
5 technical assistance to Powertech to develop  
6 complete UIC permit applications, not to acquire  
7 information from them to inform permitting or  
8 aquifer exemption decisions.

9 MR. HILL: Correct.

10 JUDGE LYNCH: What's the distinction  
11 being made there?

12 MR. HILL: I think the distinction  
13 being made there is whether the agency itself was  
14 considering that in making its decision.

15 And the way that I interpret what  
16 they're saying there is that they did not  
17 consider the technical guidance that they gave to  
18 the agency in making their decision.

19 JUDGE LYNCH: But you, in those  
20 discussions, imply two people talking. Right? I  
21 mean, again, was there not a back-and-forth, an  
22 exchange of technical information?

1                   MR. HILL: Was there not an exchange  
2 back and forth between the company and the  
3 agency?

4                   JUDGE LYNCH: Correct. Right.

5                   MR. HILL: Well, of course there was  
6 an exchange back and forth between the company  
7 and the agency. The question I think for  
8 determining whether it would part of the  
9 administrative record, is whether the agency  
10 considered that in making its decision, that  
11 exchange back and forth.

12                   And I think they're entitled to a  
13 presumption of regularity in putting the  
14 administrative record together. And what they're  
15 saying in that response to comment is that they  
16 did not consider that exchange in making their  
17 decision. Therefore, it would not be part of the  
18 administrative record.

19                   JUDGE LYNCH: And what about the fact  
20 that they were comments that the Petitioner  
21 submitted? Are you saying the Region was free  
22 not to consider that information?

1 MR. HILL: No, I don't think that that  
2 would be correct. I think if it was in the  
3 comments -- is that --

4 JUDGE LYNCH: What about attachments?

5 MR. HILL: They would consider the  
6 comments and the attachments, I would assume.

7 JUDGE LYNCH: Thank you.

8 JUDGE BLAKE: Thank you.

9 MR. VOORHEES: Sorry about that. If  
10 it pleases the Board, I'm Bob Van Voorhees, here  
11 on behalf of Powertech, to address Safe Drinking  
12 Water Act issues.

13 I think it's useful to sort of look at  
14 this permitting process and understand the step-  
15 by-step process that EPA goes through when  
16 they're doing UIC permits.

17 Because the first thing they're trying  
18 to do is identify whether they've got geologic  
19 formations that meet the requirements.

20 Do they have an injection zone that's  
21 going to take the injection and produce the  
22 uranium, in this case? Does it have an overlying

1 layer that has the geologic structure that's  
2 necessary to provide containment for that?

3 That's the question that they're  
4 asking when they go through the permitting  
5 process. And they make the issue the permit.

6 Now, in this case, yes, there were  
7 some boreholes there that everybody recognized  
8 could potentially interfere with that.

9 That's a different issue. They didn't  
10 have to have every individual borehole  
11 identified. They're able to say, okay, we've got  
12 this type of borehole, we understand there's that  
13 type of thing there, we can look at enough of  
14 them to make sure the applicant has to identify  
15 what's publicly available, what kind of  
16 information is there, provide that information.

17 As EPA pointed out, the permits  
18 themselves have very detailed requirements, and  
19 so do the regulations, that once you've got that  
20 permit to go construct your well field, to  
21 construct your wells, then you have another  
22 obligation to go and make sure that that

1 structurally-sufficient confining zone doesn't  
2 have holes in it that are going to allow fluid to  
3 move out.

4 And that's the requirement where you  
5 have to go and identify every one of those  
6 boreholes, every one of those wells. You have to  
7 make sure that it's structurally sound, that's  
8 either been properly plugged, or you have to plug  
9 it. You have to plug it, or if there's something  
10 that's going to allow potential movement that you  
11 are not able to structurally fix or plug, then  
12 you have to explain how it is you're going to  
13 avoid having anything go through that.

14 And that's all there in the details of  
15 the permits. I mean, there's been issues in this  
16 case about strict controls. Well, the strict  
17 controls are in the permits themselves. They're  
18 in the regulations, they're in the permits.

19 So, the fact that you've done an  
20 aquifer exemption isn't the end of the process.  
21 It then allows you to require the permittee to go  
22 and make sure that everything is going to be

1 sound. That's the continuing obligation, to  
2 avoid movement that's going to endanger USDW.  
3 So, that's why you get to the process where  
4 you're not just in the permit application.  
5 You're going to say, look, yeah, we've proven  
6 that all these boreholes are out there and  
7 plugged, because you're going to find those.

8 You're going to go find those, and if  
9 you're doing the deeper well -- the Class V well  
10 -- you're going to go down, you've got to do  
11 testing, and the investigation, the formation  
12 testing program and analysis to go through to  
13 make sure you've got what you need. And you're  
14 going to keep that contained.

15 JUDGE LYNCH: Counsel, can you clarify  
16 what you see as the permittee's burden under 40  
17 C.F.R. 144.12?

18 MR. VOORHEES: Under 144.12, you have  
19 the obligation -- and this is the obligation  
20 under the Safe Drinking Water Act -- to avoid  
21 injection operations that will endanger  
22 underground sources of drinking water.

1                   And that's not just an obligation you  
2                   have at the time that you apply for your permit,  
3                   but you have to do it through your operations.

4                   That's why you have to maintain  
5                   mechanical integrity of your wells, you have to  
6                   maintain the well field, you have to put in the  
7                   whole perimeter monitoring program to ensure that  
8                   you're not going to have things moving out of  
9                   your mine field into the USDW.

10                  JUDGE LYNCH: But you do acknowledge  
11                  you have a burden under 144.12?

12                  MR. VOORHEES: Yes. There is a burden  
13                  to continue and operate in a way -- and that's  
14                  why it's not just the application. If you look  
15                  at 144.12, it also talks about the monitoring,  
16                  the maintaining, the different things you go  
17                  through, the whole process of your operations.

18                  JUDGE LYNCH: And under 144.12, you  
19                  have a burden and obligation to provide the EPA  
20                  with sufficient information.

21                  MR. VOORHEES: You provide EPA with  
22                  sufficient information at the outset, for the

1 agency to be able to look at the structure, the  
2 geologic structure in there, and say, okay, do we  
3 have something that meets these threshold  
4 requirements to provide an adequate injection  
5 zone and an adequate confining zone?

6 And then once you get the permit, you  
7 go out there, you've got to complete that  
8 investigation to make sure that there's not  
9 anything that's going to interfere with that  
10 structural integrity. Okay.

11 JUDGE BLAKE: And if you submit all  
12 the required information for the injection  
13 authorization data package report, you have a lot  
14 of work to do under the permit pursuant to the  
15 requirements of Part 2 of the permit.

16 Once that's submitted to the agency,  
17 if the agency deems any aspect of it inadequate,  
18 what are the next steps?

19 MR. VOORHEES: Okay, I mean, once  
20 you've gone out there and you've said, look,  
21 here's what we're going to do to make sure that  
22 nothing's going to get through there, the agency



1 has to approve that.

2 They have to approve the fact that  
3 you've done all the plugging you need to do,  
4 you've done all the investigation of potential  
5 structural problems, and you've figured out a way  
6 to avoid having those result in any movement into  
7 a USDW.

8 And if the agency isn't satisfied with  
9 that, they can impose additional requirements.  
10 If some of the information comes back, says this  
11 permit's not adequate, they could go require a  
12 modification of the permit.

13 JUDGE AVILA: So, what, in your view,  
14 at the time of permit issuance, what's the, for  
15 lack of a better term, the punch line of the  
16 Region's conclusion?

17 Like, it's the applicant's burden to  
18 show the requirements of this paragraph have been  
19 met. So, what exactly does the permitting  
20 authority have to conclude at the time of the  
21 permit application?

22 MR. VOORHEES: You've got to

1 demonstrate that you've got a confining zone that  
2 is going to adequately receive the injection, and  
3 you've got an injection zone and a confining zone  
4 that has the structural potential to keep that  
5 there. And that's the threshold.

6 Then, you move on to the next step in  
7 the process to make sure you've done everything  
8 to make sure that it's going to be adequate to  
9 stop any movement.

10 JUDGE AVILA: Thanks.

11 MR. VOORHEES: The other thing I would  
12 point out is that in this discussion about  
13 groundwater monitoring, it's important to keep in  
14 mind that as EPA pointed out in their response to  
15 comment 14, they don't establish any water  
16 quality standards inside the aquifer exemption  
17 area, and they don't regulate groundwater  
18 restoration.

19 So, some of the focus on the  
20 groundwater quality and that sort of thing, those  
21 are things that are done by the Nuclear  
22 Regulatory Commission under UMTRCA, as was

1 pointed out by Mr. Parsons.

2 So, it's not up to EPA to make sure  
3 they've got all of that information that needs to  
4 be there.

5 Now, there are extensive requirements  
6 to go and collect that information once things  
7 have gone forward, both in the NRC license and in  
8 the UIC permits.

9 So, as we've pointed out, the  
10 arguments raised under the Safe Drinking Water  
11 Act, we don't believe the Petitioner sufficiently  
12 addressed the responses to comments that EPA came  
13 back with.

14 And we don't believe they really  
15 demonstrated why those responses were  
16 insufficient, erroneous, whatever, within the  
17 standards required under a petition for review to  
18 this Board.

19 JUDGE AVILA: This may not be a fair  
20 question, but I'll ask it anyway. How much of  
21 the Tribe's argument do you understand to be more  
22 an early challenge to the UIC permitting

1 regulations themselves, as opposed to underlying  
2 whether the decision here was a clearly erroneous  
3 decision by the Region?

4 MR. VOORHEES: Well, some of the  
5 things that they've raised go to things that EPA  
6 should have done or could have done outside of  
7 this particular permit proceeding.

8 And that includes their comments about  
9 the groundwater regulations that EPA proposed at  
10 one point, and then withdrew.

11 That also, I think, applies to the  
12 fact that EPA thought early on, gee, do we need  
13 to come up with new regulations for this type of  
14 permitting process? Do we need to come up with  
15 guidelines for this type of permitting process?

16 Ultimately, they said no, we're not  
17 going to do that. We're going to proceed under  
18 the UIC regulations the way they're written. And  
19 you come in, provide an application that meets  
20 all of those requirements, and then we're going  
21 to review the application with respect to those  
22 requirements that are already in place.

1 JUDGE AVILA: Thank you.

2 MR. VOORHEES: One other thing that I  
3 wanted to address is the cumulative effects  
4 arguments that have been made.

5 I point out to you that under that  
6 provision in the UIC program, if you notice, that  
7 only applies where EPA's issuing an area permit.  
8 It doesn't apply when they're doing an individual  
9 well permit.

10 And the reason that's there, as we  
11 pointed out in the regulatory history, is that  
12 when they're doing an area permit, people wanted  
13 to make sure that they're authorizing you to go  
14 in and put multiple wells in an area.

15 They wanted to make sure that the  
16 agency would consider, okay, if you've got those  
17 multiple wells, what's going to be the ultimate  
18 impact of those number of wells?

19 So, that's what the cumulative effects  
20 applies to. It doesn't apply to waste generation  
21 and that sort of thing. Here, to the extent  
22 you've got waste, that waste is going into the

1 Class V wells. And EPA did consider that.

2 To the extent that you're looking at  
3 cumulative effects, they've set up the monitoring  
4 field for the mine field, where you've got to  
5 have the perimeter.

6 So, whatever wells are put into the  
7 middle of that formation, into the middle of that  
8 mine field, are all going to be subject to that  
9 perimeter monitoring, to make sure they're not  
10 going to have untoward effects on the USDW.

11 And as we pointed out, in terms of the  
12 monitoring requirements that are there, not only  
13 is it permissible to postpone some of those  
14 requirements, but it's actually, there is  
15 required under the UIC program, for subsequent  
16 monitoring and data collection.

17 That has to be in there. That's why  
18 you've got, after you get your permit, then you  
19 implement your formation testing program and you  
20 implement your logging and testing of the wells  
21 program in order to do that.

22 So, the fact that some of this is

1 deferred, is not only allowed, it's specifically  
2 covered by the regulations.

3 JUDGE BLAKE: And technically, what's  
4 the reason for that?

5 MR. VOORHEES: Yes. I mean, because  
6 you're going to go out and find things out once  
7 you start putting wells in.

8 That may be more so with the deep  
9 wells, where you go down and you're trying to  
10 verify what you were trying to draw from other  
11 public records and everything else.

12 But once you drill down in there and  
13 you actually see what the geology is, you either  
14 confirm what you thought it was and what's  
15 covered by the permits, or you come up with  
16 something unusual.

17 JUDGE BLAKE: Counsel, I see your time  
18 is up. Do you have anything further?

19 MR. VOORHEES: No, I don't have  
20 anything further, unless you have any further  
21 questions.

22 JUDGE BLAKE: No, thank you.

1 JUDGE LYNCH: Thank you.

2 JUDGE BLAKE: I recognize that we went  
3 over with the Region. I would like to add an  
4 additional five minutes for the Tribe.

5 MR. CORTES: Yes, Your Honor.

6 MR. PARSONS: Thank you, Your Honor.  
7 I think I can --

8 JUDGE BLAKE: Actually, Counsel  
9 Parsons, before we get started -- I'm sorry -- I  
10 understand that a technological issue has been  
11 identified in our hybrid setting, and that I  
12 wanted to make sure that, are you getting any  
13 echo when we speak? Or are you okay? You're not  
14 hearing an echo?

15 MR. PARSONS: I am not. Everything's  
16 coming through loud and clear on my end. Thank  
17 you.

18 JUDGE BLAKE: Okay. Thank you so  
19 much. We were worried that you were hearing an  
20 echo, and just wanted to confirm. So, apologies  
21 for interrupting, and please proceed with your  
22 rebuttal. Thank you so much, Counsel Parsons.



1                   MR. PARSONS: No problem. It's  
2                   working out very well for me. I really do  
3                   appreciate your staff's efforts.

4                   I just wanted to briefly address some  
5                   of the comments on -- starting with some of the  
6                   comments on the Safe Drinking Water Act.

7                   With respect to the Region's argument  
8                   on the waste, as the Board inquired to EPA Region  
9                   8, the generation of that waste is a necessary  
10                  and direct consequence of those wells.

11                  And that waste has to go somewhere.  
12                  And to limit the review to only the site when you  
13                  know you're going to have to take waste off, is,  
14                  effectively, deliberately blinding yourself to  
15                  the real impacts of that waste. This is  
16                  radioactive waste that will have to be  
17                  transported across the country.

18                  Powertech identified the White Mesa  
19                  Mill as their destination for this waste. That's  
20                  sufficient for EPA to review that impact.

21                  They admit that they did not. I would  
22                  submit that that's a basis to remand.

1 JUDGE BLAKE: So, Counsel, your  
2 position is that pursuant to 40 C.F.R.  
3 144.33(c)(3), the Region was required to consider  
4 the White Mesa Mill facility? Is that your  
5 position?

6 MR. PARSONS: Well, the transport and  
7 disposal of waste there, yes. It is the  
8 necessary and direct consequence of their wells.

9 JUDGE BLAKE: I have one more  
10 question, sorry, on this particular item. I just  
11 wanted to make sure that I've got a fulsome  
12 picture. I recall that the response to comments  
13 did address the White Mesa Mill, and noted that  
14 the Region addressed it for informational  
15 purposes, and that they were not required --  
16 their position was that they were not required to  
17 do so under 144.33(c)(3).

18 Just where in the petition did you  
19 address the Region's position with regard to that  
20 statement?

21 MR. PARSONS: It looks like we  
22 addressed that on page 27 of the petition.

1 JUDGE BLAKE: Thank you.

2 MR. PARSONS: Going further, this  
3 issue of what the burden is on the front end for  
4 40 C.F.R. 144.12, you know the EPA Region 8  
5 stated that they were provided a map of known  
6 boreholes.

7 The fact is, as pointed out in our  
8 petition at page 39, there are 4,000 to 6,000  
9 unidentified boreholes at the site.

10 And so, a map of known boreholes, from  
11 our perspective, is little comfort. And where  
12 you have a situation where a site, where everyone  
13 knows that that circumstance exists, I think it  
14 makes a different standard.

15 I think in order to give the  
16 sufficient information to meet their burden under  
17 144.12, identifying those boreholes in the  
18 project area is necessary in order to determine  
19 whether that applicant can control that  
20 lixiviant.

21 The same goes for faults and fissures  
22 at the site.

1 JUDGE BLAKE: Counsel Parsons, I had  
2 a quick question on that. Sorry to interrupt  
3 you.

4 MR. PARSONS: Not at all.

5 JUDGE BLAKE: So, in part 2 of the  
6 permit, there are many requirements, the Region  
7 notes, regarding requiring a full geologic and  
8 hydrologic analysis.

9 So, nothing is going to happen, as I  
10 understand the Region's position, nothing will  
11 happen at the site, from an injection  
12 perspective, and that they are getting a host of  
13 information to ensure there's no communications  
14 between aquifers and to evaluate the fractures,  
15 to ensure that the boreholes are properly  
16 addressed if there are any that are inadequately  
17 plugged.

18 So, in light of that, I guess what I  
19 want to understand is, what is the legal error?  
20 Because the regulations definitely have two  
21 pieces in 146.34(a), and then there's (b), all  
22 the information required before you can grant

1 operational status.

2 I'm just still struggling a little bit  
3 with the Tribe's position on where did the Region  
4 err with regard to the information that was  
5 required before a permit could be issued?

6 MR. PARSONS: Sure. I would say that  
7 where you have a situation where you know that  
8 those boreholes are out there and are unplugged  
9 and unidentified, it's incumbent upon the  
10 operator to provide that information. To go out  
11 and find that information and provide it.

12 And on top of that, once it gets past  
13 that first step, the Tribe and the public are  
14 effectively cut out of the process entirely.

15 So, in effect, without requiring that  
16 on the front end where you have these known  
17 problems at the site, you eliminate the ability  
18 for the Tribe and the public to engage and to be  
19 involved, and to ensure the competency of that  
20 analysis. It effectively eliminates the ability  
21 of the Tribe to have a meaningful input.

22 Similarly, where they talk about

1       confining layers, as we point out in the petition  
2       at 40 and 42, in the NRC proceedings, which  
3       effectively was a trial, the experts from both  
4       the Tribe and Powertech admitted that these  
5       aquifers -- aquitards, rather -- are leaky.

6               And that's the language you find in  
7       the testimony. That they admit that these are  
8       leaky confining layers.

9               And so, given that, I think it  
10       requires additional information to make sure that  
11       on the front end Powertech has met its burden of  
12       proof to show that they can contain that  
13       lixiviant.

14               So, I think the unique circumstance  
15       that we're dealing with in this case gives rise  
16       to additional information that must be provided.  
17       This isn't a normal case because this area has  
18       been drilled and drilled and drilled.

19               And it, therefore, requires extra  
20       effort to make sure that that burden is going to  
21       be met to not have transmission or movement of  
22       fluid.

1 JUDGE BLAKE: So, can I just clarify?  
2 So, is your position then that the Region should  
3 have obtained more data on the front end, should  
4 have required Powertech to go out and obtain more  
5 data, before it issued the permits? Is that your  
6 position?

7 MR. PARSONS: Given the information  
8 that these boreholes are out there, yes. In  
9 order to make a demonstration that the structure  
10 is viable, this information was necessary.

11 JUDGE BLAKE: Thank you.

12 MR. PARSONS: Moving on to the APA  
13 issues --

14 JUDGE LYNCH: Can I just interject and  
15 follow up on your last statement? Are you saying  
16 that that information exists or existed?

17 MR. PARSONS: Well, Powertech owns the  
18 property. They have control of the property.  
19 They do have some of that information, like was  
20 discussed with some of the well logs.

21 And so, what they do know is that  
22 there are 4,000 to 6,000 unidentified and

1 potentially unplugged boreholes out there. And  
2 so, that's information that they have.

3 Without knowing where those holes are  
4 and how they're going to affect the geologic  
5 structures that they intend to rely on to contain  
6 the fluid, I don't think they can meet that  
7 burden. That's the position.

8 JUDGE LYNCH: Thank you.

9 MR. PARSONS: As far as the APA, I  
10 appreciated the Board's questions about the  
11 administrative record. Counsel for EPA Region 8  
12 stated on the record that there was no  
13 substantive information in those back-and-forths  
14 between industry and EPA Region 8.

15 My question is, how do we know that  
16 without a record, without any information in the  
17 administrative record from EPA?

18 We do have the information that the  
19 Tribe was able to obtain, which I think  
20 demonstrates that there was some pretty  
21 substantive back-and-forth going on.

22 My position is, or the Tribe's



1 position is, if there was substantive information  
2 going back and forth, and as Powertech's counsel  
3 mentioned, the APA standard for the record is  
4 considered directly or indirectly.

5 These were discussions directly with  
6 the permit writer for EPA Region 8, her technical  
7 staff, and Powertech, their technical staff, as  
8 well as an undetermined number of other  
9 representatives from the mining industry.

10 JUDGE AVILA: Can I just ask one  
11 question?

12 MR. PARSONS: Sure.

13 JUDGE AVILA: Why wouldn't the record  
14 then be a clearly erroneous decision by the  
15 Region if there wasn't the information to support  
16 it?

17 Or why didn't you challenge the  
18 underlying decision on the grounds that you used  
19 the wrong -- take your pick -- zone of influence,  
20 or the area of review, or you misapplied the  
21 aquifer exemption?

22 I mean, why do these communication

1 matter to that? Shouldn't you have said, look,  
2 you didn't follow the regulations and here's why?

3 MR. PARSONS: Well, we did. We've  
4 challenged the aquifer exemption. That case is  
5 pending before the Eighth Circuit Court of  
6 Appeals.

7 And given our extensive comments about  
8 the boreholes and the faults and fissures, and  
9 the leaky confining layers, I think that that was  
10 precisely aimed at these same definitional  
11 aspects.

12 The problem is, is without the whole  
13 record, it's very difficult for the Tribe and  
14 this Board, impossible for anybody, to determine  
15 what exactly happened and what discussions were  
16 had. What substantive information was exchanged.

17 I mean, the records that we provided  
18 were pretty clear. I mean, the EPA Region 8  
19 telling Powertech that they're going to be the  
20 pioneering guinea pig for how this program is  
21 going to work into the future. I think that's a  
22 pretty telling statement --

1 JUDGE LYNCH: But Counsel --

2 MR. PARSONS: -- when you're talking  
3 about binding --

4 JUDGE LYNCH: Go ahead. I wanted --

5 MR. PARSONS: Go ahead, Your Honor.

6 JUDGE LYNCH: Yes. The fact sheet  
7 though, has a very specific description of the  
8 area of review, for example. I think if you look  
9 on page 30 of the fact sheet for this permit, and  
10 it explains the definitions that were used and  
11 actually relied on.

12 Why didn't the fact sheet provide you  
13 with enough information to make specific comments  
14 or objections to the area of review, for example?

15 MR. PARSONS: You know, the whole  
16 process occurred ten years earlier, as they were  
17 figuring out these definitions in a clandestine  
18 environment.

19 And so, we certainly have issues with  
20 how this permit is drafted and the information  
21 that's required on the front end. And I think  
22 those issues go to those definitions.

1           The point is that the record is  
2           insufficient for us to evaluate what  
3           communications were had, what decisions were  
4           made.

5           Counsel for EPA said that that  
6           document should never have been released to us  
7           because it was deliberative. But we also heard  
8           that it was released to Powertech.

9           So, obviously, it was not  
10          deliberative. A deliberative document is not  
11          circulated within the public, within any member  
12          of the public, like the mining industry. Once  
13          it's circulated in that manner, it's no longer  
14          deliberative.

15          JUDGE LYNCH: But aren't those  
16          definitions included in the fact sheet?

17          MR. PARSONS: Well, the record is  
18          incomplete. That's the problem. How are we to  
19          know what occurred?

20          JUDGE LYNCH: Well, no, let me ask  
21          you, the definitions -- quote, the definitions in  
22          Attachment 30 to your petition. How are those

1 different than the definitions that appear in the  
2 fact sheet?

3 MR. PARSONS: I don't have that in  
4 front of me, obviously. However, I will say that  
5 the discussions that occurred in 2007 and '8  
6 appear to also revolve around what kind of  
7 information needs to be provided to satisfy the  
8 application requirements.

9 And so, I think it's a broader  
10 discussion that occurred that we are all not  
11 privy to --

12 JUDGE LYNCH: Well, the application --

13 MR. PARSONS: -- because EPA's decided  
14 that --

15 JUDGE LYNCH: Go ahead. I mean, the  
16 application is in the record.

17 MR. PARSONS: EPA's decided that  
18 they're going to --

19 JUDGE LYNCH: Sorry, I think there's  
20 a delay, so we keep stepping on each other. I  
21 apologize for that.

22 MR. PARSONS: Okay. I also apologize.

1 JUDGE LYNCH: I admire your  
2 perseverance given you have the flu. I just want  
3 to commend you on that. Very impressive.

4 MR. PARSONS: Thank you. It's waning  
5 a bit.

6 And then lastly, counsel for Powertech  
7 mentioned the cumulative effects analysis in  
8 discussing the impact of those wells. And that's  
9 what needs to be in that cumulative effects  
10 analysis.

11 I would again reiterate that without  
12 a cultural resources survey, without knowing what  
13 kind of significant cultural resources are out at  
14 that site, EPA Region 8 has not competently  
15 analyzed the cumulative effects, because the  
16 impacts of those wells, depending on where they  
17 are, could have significant impacts on cultural  
18 resources.

19 There's never been a competent  
20 cultural resources survey at the site, and I  
21 think that is worthy of remand in itself.

22 JUDGE BLAKE: Thank you, Counsel

1 Parsons. I want to thank all of the parties for  
2 their arguments today, and the very helpful  
3 dialogue.

4 We greatly appreciate the effort that  
5 went into preparing for today's argument and for  
6 answering all of our various questions.

7 The case is now submitted, and we will  
8 take into account today's proceeding in our  
9 deliberations on this matter.

10 Thank you very much, and I will now  
11 turn matters back to the Clerk of the Board to  
12 conclude the proceedings.

13 MR. CORTES: All rise. This session  
14 of the Environmental Appeals Board now stands  
15 adjourned.

16 (Whereupon, the above-entitled matter  
17 went off the record at 3:47 p.m.)  
18  
19  
20  
21  
22

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