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

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

RESPONSE OF POWERTECH (USA) INC.
TO PETITION FOR REVIEW

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This appeal represents the latest ploy in the long saga of meritless opposition by the Oglala Sioux Tribe ("OST") to delay the Dewey-Burdock uranium mining project. By deploying frivolous administrative and judicial tactics across numerous forums, despite numerous previous decisions in the Dewey-Burdock project's favor, OST has repeatedly attempted to hide behind complaints about process to cloak its true motives. The simple fact is that no amount of analysis, reanalysis, or study will ever dislodge OST's obstinance to the Dewey-Burdock project. In its latest bid to obstruct this project, OST is now joined in this effort by new participants who have already forfeited their right to participate in this appeal by failing to challenge the initial permit issuance. These parties largely raise arguments that have already been fully and finally decided by this Environmental Appeals Board and, to the extent they raise new arguments, they fail to demonstrate that the Environmental Protection Agency's ("EPA") decision to issue the permits was clearly erroneous or in violation of law. Accordingly, this petition for appeal must be denied in its entirety.

Factual Background

After extensive review and public comment opportunities, EPA granted Powertech the UIC permits at issue (the "Permits") for an in-situ recovery ("ISR") uranium mining operation in South Dakota (the "Dewey-Burdock Project"). The ISR process allows uranium to be produced with minimal surface disturbance by eliminating the need to extract the subsurface, uranium containing ore for processing. To accomplish this, Powertech would use Class III wells to pump out groundwater from the ore zone, fortify the groundwater with oxygen to create a lixiviant solution and reinject the fortified groundwater back into the ore zone where naturally-occurring uranium already in the ore zone would dissolve and form a complex with naturally-occurring sodium bicarbonates in solution creating a "rich" lixiviant. This "rich" lixiviant would then be brought back to the surface for uranium recovery, where the uranium would be removed using an ion exchange system, similar to a home water softener system, resulting in "barren" lixiviant. The

"barren" lixiviant would then be filtered, have oxygen re-added, and be reinjected back into the ore zone to remove more naturally-occurring uranium. Fact Sheet, Powertech (USA) Inc. Dewey-Burdock Class III Injection Wells, Custer and Fall River Counties, South Dakota, EPA Permit No. SD31231-00000 at 97 (EPA-R08-2019-0512-0226) (Administrative Record Document #196).

As a result, the bulk of the fluid used in the operation would stay in what amounts to a continuous circuit in which groundwater is repeatedly brought to the surface, processed to remove uranium, and re-injected. Only a small fraction of the groundwater exits this circuit in the form of wastewater from the processing operations, which would then be reconditioned to be as good or better than existing groundwater and reinjected using the Class V wells into a separate geologic formation far below the formation from which uranium would be produced. One of the Permits (No. SD31231-0000) authorizes the "Class III" injection wells to be used to remove and inject lixiviant into the targeted formation for uranium production; the other (No. SD52173-00000) authorizes the "Class V" wells to be used for wastewater disposal.

ISR is a relatively common mining technique, used in uranium mining in the United States for more than 30 years. While the Dewey-Burdock Project would apparently be the first ISR uranium mining operation in South Dakota, such operations have occurred in several other states, including the neighboring states of Nebraska and Wyoming. Such operations are subject to comprehensive regulation by the Nuclear Regulatory Commission ("NRC") pursuant to the Atomic Energy Act of 1954, 42 U.S.C. § 2011 *et seq*., and the injection wells used in ISR operations are also subject to UIC Program regulations implementing the Safe Drinking Water Act ("SDWA"), 42 U.S.C. § 300f *et seq*. While many states have obtained authorization to implement their own UIC programs EPA Region 8 (the "Region") directly implements the UIC Program for Class III and Class V wells in South Dakota, and issues permits, such as the ones at issue here.

The permits here, resulted after a lengthy regulatory process conducted in tandem with the even lengthier and more comprehensive NRC licensing process for the Dewey-Burdock Project. The Region published the two draft UIC permits on March 6, 2017, extending the comment period through June 19, 2017, and holding a series of public hearings in April and May 2017. *See* Response to Comments ("RTC") at 2 (Attachment 35 to the Petition). Based on its review of public comments, the Region "determined it would be appropriate to update the Class III and Class V draft area permits and associated documents and provide another opportunity for public notice and comment." *Id*. The Region published updated draft UIC permits on August 26, 2019, and held another public hearing on October 5, 2019. *Id*. at 3. With the final permits, the Region issued an over-500-page RTC that addressed the comments received and provides robust support for the Region's permit determinations.

Only one of the current petitioners, OST, sought review of the final Permits. Petition for Review (Dec. 24, 2020) ("Original Petition"). By order dated November 16, 2023, the Board denied the National Historic Preservation Act ("NHPA") section 106 issue raised in the petition. Order Denying Motion to Amend Petition for Review, Denying Review on the Petition's NHPA Section 106 Issue, and Identifying Issues in the Petition Remaining for Resolution (Nov. 16, 2023) ("2023 EAB Order"). By separate order dated September 3, 2024, the Board disposed of OST's remaining NHPA and National Environmental Policy Act ("NEPA") claims, and remanded the final permit decision for:

> the Region to apply the correct legal standard for developing the administrative record, ensure that the record includes all materials required by the part 124 regulations, consider any comments received on the parts of the permit decisions not disposed of by this order in light of any updated record, revise its response to comments document, and take further action, as appropriate, consistent with the part 124 regulations, in reissuing its permit decisions.

Order Denying Review in Part and Remanding in Part (Sept. 3, 2024) ("2024 EAB Order").[1] The 2024 EAB Order also preserved for review "(1) the SDWA issues addressed in the [Original Petition], including the [OST]'s challenges to the Region's cumulative effects analysis under EPA's UIC regulations at 40 C.F.R. § 144.3(c)(3), and (2) the [OST]'s de facto rulemaking claim." *Id* at n. 23. The 2024 EAB Order disposed of all other arguments raised by OST in the Original Petition.

OST, the Black Hills Clean Water Alliance ("BHCWA") and NDN Collective ("NDN") (collectively, "Petitioners") seek review of the Permits on four grounds: (1) failure to demonstrate compliance with the SDWA; (2) failure to abide by the procedural rulemaking requirements of the Administrative Procedure Act ("APA"); (3) failure to demonstrate compliance with the requirements of the NHPA; and (4) failure to demonstrate compliance with the cumulative effects analysis under 40 C.F.R. § 144.33(c)(3). None of the issues raised by Petitioners warrant review.

Scope and Standard of Review

The Board's consideration of petitions for review of UIC permits is guided by the principles that "the Board's power of review 'should be only sparingly exercised'" and that "the burden of demonstrating that review is warranted rests with the petitioner." *In re Envtl. Disposal Sys., Inc.*, 12 E.A.D. 254, 263-64 (EAB 2005) (*quoting* 45 Fed. Reg. 33,290, 33,412 (May 19, 1980).

As a threshold requirement, petitions for review of permit decisions must show that each issue raised has been preserved for review; specifically, the Petitioner must demonstrate that the issues and arguments it seeks to raise on appeal were raised in comments submitted on the draft permit or at a public hearing. *In re Ariz. Pub. Serv. Co.*, 18 E.A.D. 245, 250 (EAB 2020) (*citing*

[1]The 2024 EAB Order also expressly incorporated the 2023 EAB Order by reference.

In re Gen. Electric Co., 17 E.A.D. 434, 464 (EAB 2018)). In addition, petitioners "must demonstrate that each challenge to the permit decision is based on a finding of fact or conclusion of law that is clearly erroneous." 40 C.F.R. § 124.19(a)(4)(i). To satisfy that standard, "it is not enough to merely cite or reiterate comments previously submitted on the draft permit." *Ariz. Pub. Serv.*, 18 E.A.D. at 251 (*citing In re City of Taunton Dep't of Pub. Works*, 17 E.A.D. 105, 111 (EAB 2016), *aff'd*, 895 F.3d 120 (1st Cir. 2018), *cert. denied*, 139 S. Ct. 1240 (2019)). Instead, "the petitioner must demonstrate, with factual and legal support, why the Region's response to comments on the issue raised is clearly erroneous or otherwise warrants review." *Ariz. Pub. Service*, 18 E.A.D. at 251 (*citing* 40 C.F.R. § 124.19(a)(4)(i); *see, e.g.*, *In re Seneca Res. Corp.*, 16 E.A.D. 411, 416 (EAB 2014)); *see also*, 2024 EAB Order at 38-40. The regulations governing Board review of UIC permits state that petitioners "must demonstrate, by providing specific citation or other appropriate reference to the administrative record by including the document name and page number, that each issue being raised in the petition was raised during the public comment period (including any public hearing)." 40 C.F.R. § 124.19(4)(ii). In addition, where issues have been addressed in the Region's RTC, the regulations specify that a "petitioner must provide a citation to the relevant comment and response and explain why the Regional Administrator's response to the comment was clearly erroneous or otherwise warrants review." *Id.*

The scope of the Board's review is also limited by the long-established principle that "parties objecting to a federally issued UIC permit must base their objections on the criteria set forth in [the SDWA] and its implementing regulations." *In re Brine Disposal Well, Montmorency Cnty., Mich.*, 4 E.A.D. 736, 742 (EAB 1993). Challenges to UIC permits must therefore "pertain exclusively to the UIC program and its focus on protecting underground sources of drinking water from possible harm caused by underground injection activities." *In re Jordan Dev. Co.*, 18 E.A.D.

1, 11 (EAB 2019); *see In re Envtl. Disposal Sys., Inc.*, 12 E.A.D. 254, 266 (EAB 2005) (the Board's "authority to review UIC permit decisions extends to the boundaries of the UIC permitting program itself, with its SDWA-directed focus on the protection of USDWs, and no farther"); *In re Am. Soda, L.L.P.*, 9 E.A.D. 280, 286 (EAB 2000) ("the SDWA and the UIC regulations authorize the Board to review UIC permitting decisions only as they affect a well's compliance with the SDWA and applicable UIC regulations"); *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 567 (EAB 1998) ("protection of interests outside of the UIC program [is] beyond our authority to review in the context of [a UIC] case"), *review denied sub nom. Penn Fuel Gas, Inc. v. U.S. EPA*, 185 F.3d 862 (3d Cir. 1999).

Lastly, the scope of review "following remand is limited to issues the Board remanded and any other changes to the permit made during the remand period." *In re GE*, 18 E.A.D 575, 664 (EAB 2022) (*citing In re Shell Gulf of Mexico, Inc.*, 15 E.A.D. 470, 476-77 (EPA 2012)). The Board has consistently denied consideration of issues not raised in the initial petition for review and recognized that "this limitation on the scope of review furthers the important principle of bringing repose and finality to contested issues." *Id.* (*citing In re Upper Blackstone Water Pollution Abatement Dist.*, 15 E.A.D. 297, 302 (EAB 2011)). The 2024 EAB Order allows "anyone dissatisfied with the Region's decision on remand" to file a petition for review that "shall be limited to the issues considered on remand and any modifications made to the permits as a result of the remand" and states "the [OST] may, if it so chooses, raise [the SDWA and de facto rulemaking] issues in a new petition." 2024 EAB Order at n. 23.

Argument

The Board must deny Petitioner's request for review of the Permits. The Board's scope of review following remand is expressly limited to the issues considered on remand and any

modifications made to the permits as a result of the remand. This strict limitation is essential to preserve finality in administrative proceedings.

As an initial matter, the BHCWA and NDN improperly seek to introduce arguments outside the scope of review following remand. These organizations failed to file timely petitions for review of the initial final Permits as required by the regulations and cannot now circumvent this jurisdictional requirement by piggybacking onto the limited issues preserved by OST's prior appeal. NDN further fails to meet the threshold requirement for review because it did not submit written or oral comments to the draft Permits as explicitly required for standing under the regulations.

The Region reasonably set the terms and conditions of the Permits, taking into account the concerns legitimately raised in timely submitted comments. The Petitioners uniformly fail to meet any factors that warrant review under the regulations by failing to demonstrate that the Permits' terms and conditions are based on clearly erroneous findings of fact and conclusions of law. The Petitioners also fail to "provide[e] specific citation or other appropriate reference to the administrative record" to show that "each issue being raised in the petition was raised during the public comment period," 40 C.F.R. § 124.19(4)(ii), and deliberately ignore the Region's robust record and RTC, which support the Region's determinations. The Petitioners further raise new issues that are outside the scope of the Board's review on remand and fundamentally misinterpret the law. Accordingly, Powertech respectfully requests the Board deny the Petition in its entirety.

I. BHCWA and NDN Have Not Met the Threshold Requirements to Participate in this Proceeding Before the Board

Because BHCWA and NDN failed to file petitions for review of the initial final Permits within the mandatory 30-day timeframe, all arguments they now raise are procedurally barred. The

Board has consistently enforced this requirement as a jurisdictional prerequisite that cannot be waived or excused.

Even if some of their arguments could theoretically not have been raised earlier—a proposition Powertech disputes—such arguments would fall outside the scope of review permitted for the final Permits following remand, which is explicitly restricted to the issues considered on remand and any modifications made to the Permits as a result of the remand.

NDN's position is even more fundamentally flawed, as it failed to submit any public comments on the draft Permits—a prerequisite to administrative standing under the regulations that cannot be cured or excused.

A. BHCWA and NDN's Petitions Are Untimely

Neither BHCWA nor NDN filed a petition for review within the mandatory 30-day window after the Region served notice of the issuance of the initial final Permits, despite clear notice requirements under the regulations. This failure alone is fatal to their current petition brought approximately half a decade later. Each of the arguments now raised by BHCWA and NDN could have been—and should have been—raised at the time of the initial appeal, as evidenced by the fact that such arguments were raised by OST in its Original Petition.

The Board has previously cited failure to file a petition in a prior appeal proceeding as one factor in support of denying a petition that only raises issues that could have been raised in the initial appeal. *In re Upper Blackstone Water Pollution Abatement Dist.*, 15 E.A.D. 297, 302 (EAB 2011) ("West Boylston neither filed a petition in the prior appeal proceeding, nor demonstrates in its petition here that it submitted comments on the 2007 draft permit or participated in the public comment process in 2007. Accordingly…West Boylston [has] standing to seek Board review only to the extent of the changes from the draft to the final permit decision"). Further, even where a party comments on a specific issue in the public comment period for a draft permit and files an

appeal to the final permit, the Board has recognized that its failure to raise such issue in the initial appeal "effectively abandon[s]" that issue and it cannot be raised in a subsequent appeal following remand. *In re Dominion Energy Brayton Point, L.L.C.*, 13 E.A.D. 407, 438 (EAB 2007) (*citing In re Knauf Fiber Glass, GmbH,* 9 E.A.D 1, 7 (EAB 2000)).

In accordance with the above principals, in the 2024 EAB Order, the Board appropriately restricted appeals following remand to those issues considered on remand and resulting modifications. In the 2024 EAB Order, the Board also specified that while "anyone dissatisfied" with the Region's decision could appeal issues considered on remand and resulting modifications, only OST could reraise issues that were raised in the initial appeal but not decided on the merits.

BHCWA and NDN failed to raise any arguments when originally given an opportunity to appeal half a decade ago. Further, in accordance with Board precedent, new arguments would be untimely and in accordance with the 2024 EAB order, previously raised arguments may only be raised now by OST. As a result, the Board should find that BHCWA and NDN lack standing because they failed to timely raise the arguments raised in the Petition.

B. NDN Lacks Standing Because it Failed to Submit Comments or Participate in Public Hearings on the Draft Permits

NDN asserts in the Petition that is has met the threshold requirements because "Members and staff of NDN Collecitve participated in the October 5, 2019 public hearing on the draft permits held by EPA in Hot Springs, SD." Petition at 6 (transcript at Administrative Record Document #659). A thorough examination of that transcript reveals no mention of NDN or any individuals identifying themselves as members or representatives of NDN.

Even assuming arguendo that the "members and staff" referenced in the Petition could otherwise be viewed as representing NDN without identifying their comments as being presented on behalf of NDN, the Petition does not provide the level of specificity demanded by 40 C.F.R.

§ 124.19(a). The Petition does not identify a single member or staff person or attempt to provide any information that could be used to verify their participation by looking at the transcript. This level of vagueness is legally insufficient as previously established by the Board, "[t]he Board is not obligated to scour the administrative record to determine whether an issue was properly preserved for Board review." *In re Energy Answers Arecibo, LLC*, 16 E.A.D. 294, 310 (EAB 2014). NDN's failure to establish this basic jurisdictional requirement provides sufficient ground to deny its petition.

C. To the Extent any Arguments in the Petition Are Construed as Not Capable of Being Previously Raised, They Are Nonetheless Outside the Scope of this Proceeding

While the foregoing arguments provide sufficient reason to deny their current appeal, to the extent the Board interprets any of the arguments raised by BHCWA and NDN in the Petition as having not previously been capable of being raised, such arguments are nonetheless outside the scope of review in this appeal. The Board unambiguously limited review to the issues considered on remand and resulting changes to the Permits. 2024 EAB Order at n. 23. The Board's remand was narrowly tailored to three specific issues: (1) supplementing the administrative record; (2) reconsidering OST's remaining challenges in light of the supplemented record; and (3) making any necessary updates to the Permits and RTC.

Importantly, following the Region's careful review and consideration of the supplemental administrative record, no changes were made to the Permits. Because the Permits remain unchanged following remand, BHCWA and NDN cannot satisfy the Board's express jurisdictional requirements for this review. The only argument raised by BHCWA and NDN that purports to be based on new information—the NHPA argument discussed further in Section IV below— fails to meet the Board's explicitly stated requirement that appeals be limited to issues considered on remand and any modifications made to the Permits. Since this NHPA argument was not considered

on remand and resulted in no modifications to the Permits, it is, by definition, outside the scope of this proceeding.

II. The Region's Permitting Actions Satisfy SDWA Requirements.

Petitioners assert that the Region failed to comply with the 40 C.F.R. § 144.33(c)(3) requirement that "[t]he cumulative effects of drilling and operation of additional injection wells are considered by the Director during evaluation of the area permit application and are acceptable to the Director." This consideration of cumulative effects of additional injection wells is a condition for granting the area permits at issue here. Petitioners fail to demonstrate that the Region's permitting analysis was based on clearly erroneous findings of fact and conclusions of law, as required by 40 C.F.R. § 124.19(a)(1). In support of this argument, Powertech incorporates by reference the arguments presented at pages 9 through 12 of the Response of Powertech (USA) Inc. to Petition For Review, In re Powertech (USA) Inc., UIC Appeal No. 20-01 (Docket No. 56, Dec. 22, 2023) as allowed by the Board. *See* 2024 EAB Order at 46 n. 23.

A. Petitioners Failed to Demonstrate the Region's Responses to Comments Were Erroneous.

Petitioners must demonstrate "why the Region's response to comments on the issue raised is clearly erroneous or otherwise warrants review." *Ariz. Pub. Service*, 18 E.A.D. at 251 (citing 40 C.F.R. § 124.19(a)(4)(i); *see, e.g., In re Seneca Res. Corp.*, 16 E.A.D. 411, 416 (EAB 2014)). The regulations governing Board review of UIC permits state that a petitioner "must demonstrate, by providing specific citation or other appropriate reference to the administrative record by including the document name and page number, that each issue being raised in the petition was raised during the public comment period (including any public hearing)." 40 C.F.R. § 124.19(a)(4)(ii). In addition, where issues have been addressed in the RTC, the regulations specify that a "petitioner

must provide a citation to the relevant comment and response and explain why the Regional Administrator's response to the comment was clearly erroneous or otherwise warrants review." *Id*.

The Original Petition spelled out (at 25) the cumulative effects failure claim which is reasserted in the Petition:

> The administrative record, including EPA's decision documents and EPA's Response to Comments, fails to demonstrate that EPA adequately analyzed the cumulative effects of the granting of the Class III and Class V UIC area permits. Specifically, the [OST]'s comments show how EPA's analysis failed to consider and evaluate cumulative effects to cultural resources in the impacted area, groundwater quantity effects in the impacted area, the cumulative effects associated with other mines/projects in the region, and the effects of waste transportation and disposal. See Attachment 1 at 15-18; Attachment 2 at bates 0002-0005, 0046-0048, 0053, 0061-0062.

The Petition asserts that consideration of these cumulative effects is required by 40 C.F.R. § 144.33(c)(3). The RTC states, "The issues required to be considered are limited to those potential environmental effects at or near the project site that occur close in time with the drilling and operation of the injection wells." RTC #238 at 271. "Our only role under the SDWA is to consider this issue to determine whether effects related to the drilling and operation of additional injection wells are acceptable. *See* 40 CFR § 144.33(c)(3)." RTC #269 at 318. Accordingly, the Region excluded consideration of cultural resources effects, which are not environmental effects. The Region also explained that § 144.33(c)(3) does not extend to "cumulative effects analysis for all permits and aquifer exemptions that have the potential to impact the tribes of the Great Sioux Nation. The Region's obligation to consider cumulative effects is not this broad." RTC #332 at 366. Thus, the Region excluded the cumulative effects associated with other mines/projects in the region from its cumulative effects consideration. The Region stated further: "None of the projects listed by the commenter share environmental effects in common with the Dewey Burdock [P]roject." *Id*. The Region's response to public comments also explained that, regardless of whether required to do so, the Region did address groundwater quantity issues around consumption

or use. RTC #311 at 355. Petitioners do not explain why this was erroneous as a matter of fact. Likewise, the claim that "radon emissions are not addressed" by the Region (Petition at 26) was denied by the Region in the RTC:

> EPA considered this issue in Section 9.0 of the Cumulative Effects Analysis, which provides a summary of potential radiological impacts evaluated for the NRC Licensing process, including impact from radon. Radon emissions and risks resulting from the impoundments constructed pursuant to 40 CFR part 61, subparts A and W have been evaluated through the regulation development process and have been found to be acceptable if the requirements of subpart W are met. Specifically, unconventional impoundments are required to maintain liquid coverage which attenuates the release of radon from solids that settle to the bottom of the impoundment.

RTC #327 at 363. In addition, the Region denies any failure to consider waste issues, stating: "EPA's CEA considers radioactive waste in Sections 3.3.4 through 3.3.4.2 for discussions on how radioactive wastes are dealt with on-site." RTC #330 at 365. The Region also rejected Petitioners' argument that permanent disposal of wastes or radioactive solids must be addressed in the cumulative effects consideration:

> EPA disagrees with the commenter's assertion that the permanent disposal of solid byproduct waste taken off-site must be considered under 40 CFR § 144.33(c)(3). This provision requires EPA to consider the cumulative effects "of drilling and operation of additional wells." Therefore, the issues required to be considered are limited to those environmental effects at or near the project site that occur close in time with the drilling and operation of the injection wells. For this reason, while EPA's draft CEA included a summary of NRC's information on White Mesa Mill, it was for informational purposes only. Additional analysis on White Mesa Mill or any other potential disposal facilities off the Dewey Burdock site is not required. The potential use of the White Mesa Mill or other facility to dispose of 11e.2 byproduct material is later in time and too far away from the injection wells to be considered as cumulative effects under this regulation.

Id. Petitioners offer no argument that this conclusion is erroneous as a matter of law.

Petitioners do not even attempt to explain why these responses were clearly erroneous or otherwise warrant review. Therefore, these claims must be denied.

B. The Board Has Already Rejected Petitioners' Claims Regarding Future Operations.

Petitioners assert that the Region failed to address Powertech's "expanded scope of the Project area,[2] additional processing proposals, and the current site configuration." Petition at 26. The documents regarding future plans that Petitioners cite have already been considered by the Board in the context of denying OST's attempt to supplement its Original Petition. The motion to supplement would have incorporated claims relating to most of the same documents relied upon by Petitioners in pages 26 through 30 of the Petition.[3] In denying the motion to supplement, the Board stated:

> The three Preliminary Economic Assessment documents are not relevant to the matter before us and do not present an important policy consideration, as the [OST] suggests. As Powertech explains, the changes described in the documents are only proposals for future expansions of operations and the documents caution that there is no certainty that the preliminary economic assessment will be realized. Powertech's Resp. to Mot. to Amend. at 13; Powertech's Response to EAB Order of June 30, 2023, at 7 (July 28, 2023) ("Powertech's Add'l. Br."). The documents confirm this, and [OST] acknowledges as much. See, e.g., Supplemental Petition for Review, attach. 3 at 4, 9-10, 84 n.1, 96 n.1, 120, 132 n.1 (Apr. 21, 2023) ("Tribe's Supplemental Pet."); *see also* Tribe's Supplemental Pet. at 2 ("each one [of the preliminary economic assessments] details expanded *proposals* for operations related to the Dewey-Burdock property and surrounding areas") (emphasis added); id. at 4 ("The significant changes *proposed* through these documents * * *") (emphasis added). The documents also discuss the need for further permitting. *See, e.g.*, Tribe's Supplemental Pet., attach. 3 at 5. Moreover, the challenged UIC permits expressly prohibit any underground injection activity not authorized by the permits, or by rule. Region 8, U.S. EPA, Final Class III Area Permit, at 1 (Nov. 24, 2020) ("Class III Permit"); Region 8, U.S. EPA, Final Class V Area Permit, at 1 (Nov. 24, 2020) ("Class V Permit").

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[2] Petitioners' claim of project expansion based upon comparison of the two maps presented in Attachments 14 and 15 to the Petition are unsupported because the November 2018 press release in Attachment 14 states: "It is an important distinction that all of the tonnage outlined in today's resource update falls within Azarga's existing NRC license boundary." Consequently, this does not involve an expansion beyond what is currently permitted. The same is true for the December 4, 2019 press release in Attachment 16, which simply provides an increased estimate of the uranium that might be recovered from the same licensed and permitted area. Indeed, that press release emphasizes that the results "are preliminary in nature and includes inferred mineral resources that are considered too speculative geologically to have the economic considerations applied to them that would enable them to be categorized as mineral reserves." Attachment 16 at 4. The press release adds: "There can be no assurance that recovery at this level will be achieved." *Id*.

[3] Specifically, Attachments 40, 41, and 42 to the Petition are addressed in the 2023 EAB Order at 14-16. The additional document cited by Petitioners as "Management's Discussion and Analysis (MDA) submitted to the U.S. Securities and Exchange Commission on November 14, 2024" (Attachment 43) is similar in being preliminary to submitting an actual permit application: "In Wyoming, the Company conducted resource development drilling on its Dewey-Terrace project area, as well as conducted *pre-submittal* permit data collection by core drilling on its Gas Hills Uranium Project located in Fremont and Natrona Counties." Attachment 43 at 1 (emphasis added). Implementation of this project will require a new permit.

> And, as the Region explains, if Powertech chooses to modify the project in the future beyond the scope of the issued permits, it will have to seek a permit modification in accordance with 40 C.F.R. § 144.39, and submit an updated application or additional information as appropriate. 13 Region's Resp. to Mot. to Amend at 10. If the Region grants such permit modification, it would be a separate permitting process subject to challenge and Board review. *Id*.

2023 EAB Order at 14-15. In response to Petitioners' argument on this issue, Powertech incorporates by reference its arguments in Powertech's Resp. to Mot. to Amend. at 9 & 13-17 (May 8, 2023); Powertech's Response to EAB Order of June 30, 2023, at 6-7 (July 28, 2023). The Board stated further that "the three Preliminary Economic Assessment documents do not depict any actual changes in project scope and design, the petition already references a document relating to the preliminary economic assessment for the Dewey-Burdock Project, and significantly the permits and applicable regulations require Powertech to seek a modification of the permits if it decides to engage in activities not authorized by those permits." 2023 EAB Order at 16. In addition, the Board found these documents to be post-decisional materials, consideration of which is precluded by the part 124 regulations that deem the record complete on the date the final permit is issued and Board precedent on supplementing the administrative record. 2023 EAB Order at 17-18. Accordingly, Petitioners' claimed requirement for cumulative effects consideration of these potential future developments must be denied.

The limited nature of the section 144.33(c)(3) cumulative effects consideration requirement, as demonstrated by Powertech's explanation of its regulatory history in Powertech's Resp. to Mot. to Amend. at 15-16, and the Region's effective demonstration of its compliance with those provisions in responding to comments support denial of Petitioners' claims on this issue.

C. The Region Fully Complied with the SDWA and Implementing Regulations Regarding Operations and Protection of USDWs.

In claiming failure to comply with the SDWA and UIC regulations with respect to baseline groundwater information and hydrogeological analysis, Petitioners rely on the arguments

presented in the Original Petition at 34-45. Petition at 2. In response, Powertech incorporates by reference the arguments presented in its Response to the Petition at 12 through 26. The Petition asserts two SDWA challenges and notes that these were raised in its comments, Petition at 35, but the Petition fails to acknowledge that the Region responded, succinctly and pointedly refuting each challenge. Nor does the Petition "explain why the Regional Administrator's response to the comment was clearly erroneous or otherwise warrants review," as required by 40 C.F.R. § 124.19(a)(4)(ii). For this reason alone, each of the SDWA challenges should be dismissed. *In re Teck Cominco Alaska, Inc.*, 11 E.A.D. 457, 494-95 (EAB 2004); *In re Westborough*, 10 E.A.D. 297, 305, 311-12 (EAB 2002); *In re City of Irving*, 10 E.A.D. 111, 129-30 (EAB 2001), review denied sub nom. *City of Abilene v. EPA*, 325 F.3d 657 (5th Cir. 2003). Moreover, Petitioners fail to demonstrate clear error in the Region's determination, based on its technical expertise, that the data it reviewed adequately allowed for characterization of the project Area of Review. The Petition fails to demonstrate clear error in the Region's analysis of hydrogeological technical information or address the Region's thorough responses to Petitioner's arguments. In addition, the UIC regulations not only anticipate, but also require, post-permit monitoring and data collection. The lawful reason for delaying formation testing, data collection, and required corrective action is to make those requirements enforceable and subject to the bar on injection until completed. The Petition neither acknowledges the Region's response on this issue nor explains why it is clearly erroneous.

III. The Region's Issuance of the UIC Permits Complied with the Administrative Procedure Act.

As shown below, the Region acted well within its authority under validly promulgated regulations. It did not create binding norms, alter legal standards, or constrain future discretion. Rather, it evaluated Powertech's application against existing regulations, applied independent

judgment, and provided a reasoned basis for its permitting decision. Petitioners' APA claim fails on both legal and factual grounds, and must be denied.

A. The Region Did Not Engage in a *De Facto* Rulemaking

Pursuant to the 2024 EAB Order, Powertech incorporates by reference its arguments regarding *de facto* rulemaking under the APA set forth in its response to OST's petition in the initial appeal. Response of Powertech (USA) Inc. to Petition for Review at 27-30 (Dec. 22, 2023).

The APA provides for two types of agency decision making: rulemakings and adjudications. *See* 5 U.S.C. §§ 553-54. Rulemakings are agency processes for formulating, amending, or repealing an agency statement designed to implement, interpret or prescribe law or policy or describe the organization, procedure, or practice requirements of an agency. 5 U.S.C. § 551(4)-(5). Adjudications are agency dispositions other than a rulemaking but including licensing. *Id* at (6)-(7). Adjudication is used for determinations based on facts in a particular case while rulemaking is used for more general pronouncements. *Union Pac. R.R. v. Surface Transp. Bd.*, 113 F.4th 823, 835 (8th Cir. 2024). Where conducting an adjudication requires the development of standards, agencies are afforded substantial discretion in determining whether to first promulgate a generally applicable rule before applying the general standards to an individual or entity, or whether to develop standards by adjudication. *Oiciyapi Federal Credit Union v. National Credit Union Admin.*, 936 F.2d 1007, 1010 (8th Cir. 1991) (*citing NLRB. v. Bell Aerospace Co.*, 416 US 267, 294 (1974)).

Because permitting decisions determine the individual rights of the permit applicant they are generally characterized as informal adjudications. *See Northern Arapaho Tribe v. Ashe*, 92 F.Supp.3d 1160, 1172 (D. Wyo. 2015). An adjudication can, in certain rare circumstances be construed as *de facto* rulemaking when certain well-established standards are met. In evaluating whether an agency guidance or policy document is a *de facto* rulemaking, courts generally consider

whether the agency has "(1) impose[d] any rights and obligations, or (2) genuinely [left] the agency and its decisionmakers free to exercise discretion." *CropLife Am. V. EPA*, 329 F.3d 876, 883 (D.C. Cir. 2003) (citation and internal quotation marks omitted). "[T]he ultimate focus of the inquiry is whether the agency action partakes of the fundamental characteristic of a regulation, i.e., that it has the force of law." *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 382 (D.C. Cir. 2002) (*quoting Molycorp, Inc. v. EPA*, 197 F.3d 543, 545 (D.C. Cir. 1999)).

Petitioners' *de facto* rulemaking claim fundamentally mischaracterizes the nature and purpose of the Region's discussions with industry representatives. As the Region explained in its Revised RTC ("RRTC") document, the agency's binding regulations require the Region to "determine [the area of review and aquifer exemption boundary] in each instance based on site-specific information provided to the EPA." RRTC #184. This statement reflects the Region's adherence to, rather than departure from, the existing regulatory framework.

The regulatory framework for determining area of review and aquifer exemption boundaries was established through proper notice-and-comment rulemaking. 40 C.F.R. § 146.6 sets forth detailed, binding criteria for determining the area of review while 40 C.F.R. §§ 144.7 and 146.4 set forth detailed, binding criteria for identification and determination of exempt aquifers. Additional applicable definitions and criteria are located throughout 40 C.F.R. Parts 144 and 146. Application of these regulatory criteria necessarily requires an applicant to provide site-specific information that can be measured against the regulatory criteria. The administrative record, as supplemented following remand, reflects discussions between the Region, Powertech, other ISR experts in industry, states and other EPA regions which ultimately led to the draft discussion document located at Attachment 30 of the Petition ("Draft Discussion Document").

Far from constituting a *de facto* rulemaking, the Draft Discussion Document contains merely a plain language description of the regulatory requirements and intent behind the regulations, as well as a description of the type of information an applicant should submit with the application to ensure EPA is able to evaluate the application for compliance with regulatory requirements. The Draft Discussion Document also contains a list of relevant definitions as they already appeared in the regulations prior to development of the Draft Discussion Document. These definitions were not created or modified through this process, but merely reproduced from existing regulations.

The Region's robust, transparent evaluation process demonstrates its commitment to properly applying existing regulations, not creating new ones. As described in RRTC #183, "[t]he 132-page Class III Area Permit Fact Sheet, 49-page Class V Area Permit Fact Sheet, and 29-page [aquifer exemption record of decision] provide extensive explanation as to the reasons for the permit conditions in the Permits and [aquifer exemption] decision." These publicly available evaluation documents, which were subject to notice and comment, contain descriptions of the relevant regulations; detailed technical descriptions of the Dewey-Burdock Project including citations to applicable studies; citations to data and calculations provided by Powertech and the Region's independent analysis of such data and calculations; and basis upon which the Region determined that Powertech's application complied with applicable regulations. *See, e.g.*, Dewey-Burdock Class V Draft Area Permit, Ver 2 Fact Sheet at 22-31, Section 4.0 Area of Review Evaluation and Corrective Action Plan.

The Region's evaluation of Powertech's submission amounts to a true independent evaluation, far from being a mere rubberstamp. For example, the Region disagreed with assumptions used by Powertech for critical pressure values involving the Madison Formation. *Id*

at 24. Instead, the Region performed its own calculations based on independent studies of the area, provided supporting evidence in the administrative record, and inserted a condition in the Permit requiring Powertech to recalculate critical pressure rises based on site-specific information collected during construction. *Id* at 24-25. This level of independent analysis and imposition of additional site-specific conditions is incompatible with Petitioners' characterization of the process as a *de facto* rulemaking. Such individualized analysis is consistent with informal adjudication. *Northern Arapaho Tribe*, 92 F.Supp.3d at 1172.

Nothing in the administrative record supports the Petitioners' claim that the Region established binding requirements outside the proper rulemaking process. Additionally, nothing in the administrative record, including discussions between the Region and Powertech, the Draft Discussion Document, or the independent evaluation for compliance, suggests that the process that played out, imposes rights or obligations on future applicants or otherwise binds the agency with the force of law in making determinations on future applications. To the contrary, the administrative record demonstrates a highly site-specific evaluation process that will need to play out anew for each applicant (albeit with the Region having more experience that will allow it to more expeditiously apply the regulatory criteria to future applications).

Petitioners assert that the Draft Discussion Document and related discussions between the Region and Powertech were "highly substantive in nature and establishes significant precedent on critical issues" such as "effectively defin[ing] the terms 'area of review', 'zone of influence', and 'aquifer exemption boundary' as they will apply to all future EPA Region 8 UIC Class III applications." Petition at 11. This assertion fundamentally misunderstands both the legal standard for identifying a *de facto* rulemaking and the nature of the communications at issue. Petitioners cite no authority, and to Powertech's knowledge none exists, for the assertion that "highly

substantive" discussions are a factor that demonstrates evidence of a *de facto* rulemaking, if anything, it countenances towards informal adjudication. *See Northern Arapaho Tribe*, 92 F.Supp.3d at 1172.

Further, as noted above, the definitions in the Draft Discussion Document are not new "effectively defined" terms given meaning through this document but instead are actual, word-for-word definitions that already appeared in the regulations promulgated following notice and comment prior to development of the Draft Discussion Document. The Region was merely applying these pre-existing regulatory definitions to the specific factual context of ISR mining operations—precisely what agencies do when implementing regulations.

The remainder of that document is a discussion of how the definitions relate to one another; where a regulatory definition allows for a choice of paths to pursue, which path is generally more appropriate for ISR from a technical perspective; and a description of the type of information the Region would generally expect to see an applicant submit in order to give the Region the information it needs to complete its compliance evaluation. Such guidance to assist applicants in navigating complex regulations does not establish new legally binding requirements—the hallmark of rulemaking.

Petitioners further cite to email communications in which Powertech and other consultants provided technical insight to the Region as purported evidence that industry supplied the definitions contained in the Draft Discussion Document, but again, the definitions in the document are merely the existing regulatory definitions. The Fact Sheets provide ample evidence, subject to notice and comment, of the Region's evaluation of how site-specific conditions apply to the regulatory definitions.

Petitioners misinterpret casual statements in emails about process improvements. Petitioners cite to emails stating that Powertech gets "to be the pioneering guinea pig that will make life easier for others following in your path" and asking if there is a way to make draft guidance documents "more helpful for permit applicants." *Id* at 14. These statements reflect nothing more than the natural efficiency gains that occur when an agency gains experience with a particular type of application—not evidence of binding rules being established outside proper procedures. Petitioners never attempt to explain how the result of this process is binding on future applicants, a prerequisite to a *de facto* rulemaking. *Gen. Elec. Co. v. EPA*, 290 F.3d at 382. A more rational explanation is simply that engaging in this informal adjudication process has given the Region valuable experience and knowledge that it can apply to future applications without needing to ask for as much information from applicants.

Petitioners further mischaracterize the Region's efforts to coordinate with state regulators. Petitioners assert that the Region culled South Dakota regulations to develop its own regulatory process and cite to an email stating that "the Powertech application submission will be a 'test' for the EPA's new permitting requirements to "see how they hold up in reference to reality.'" *Id* at 13-14. Review of the cited documents, however, reveals a different conclusion and demonstrates that Petitioners' interpretation is inaccurate. First the Region was not searching South Dakota regulations as a means of developing its own new regulations, but rather seeking guidance from state regulators on how to ensure *permit conditions* – not *regulations* – at the state and federal levels can be coordinated within each jurisdiction's existing regulatory schemes to avoid inadvertent inconsistencies or unnecessarily requiring different actions by Powertech to make fundamentally the same compliance demonstration to each jurisdiction. Attachment 33 to the Original Petition (bates 0120-0125).

The Region's statements about "testing" guidance documents further contradict Petitioners' argument. The Region did not assert that Powertech's application would be a test for new permitting requirements, but rather stated "do not be dismayed if the permit application you have prepared does not look exactly like" the draft guidance documents, and "I consider review of your permit application to be a test for these draft documents to see how they hold up in reference to reality." *Id* (bates 0240). This statement directly refutes Petitioners' arguments that a rulemaking has occurred because the Region has expressly stated that the application need not look exactly like the draft guidance documents. Instead, the application can vary from the guidance as necessary so long as it complies with the binding regulations. This latitude for application-specific variations is fundamentally inconsistent with the concept of binding rules being established.

For the forgoing reasons, Petitioners have not met their burden to show that the Region created binding regulations that will apply to future applicants outside of the APA's procedural requirements. Accordingly, the Petitioners' *de facto* rulemaking claim must be denied.

B. The Region has Included All Applicable Records in the Administrative Record.

Petitioners assert that the administrative record remains incomplete because the Region did not include information and data provided by Powertech during the year-long pre-application discussions between the Region and Powertech in violation of 40 C.F.R. § 124.9(b)(1). This assertion is factually incorrect and legally misguided.

Following the Board's remand order, the Region conducted a comprehensive and systematic review of all documentation related to the permitting process. The Region added eight documents to the administrative record dated in the year 2007, prior to the first application in 2008 as well as additional attachments that were included as part of the 2008 application. Administrative

Record Document #1011-30 and #1035-42. These additions demonstrate the Region's good-faith effort to ensure a complete record that satisfies all regulatory requirements.

The Region has asserted in the Determination on Remand that it performed a detailed search and updated the administrative record to reflect all documents required by applicable regulations. Petitioners have asserted no basis to believe otherwise. In the absence of clear evidence to the contrary, agencies engaged in adjudication are afforded a "presumption of regularity" and courts defer to agency representations about what information it relied on in reaching its decision. *FDA v. Wages & White Lion Invs., L.L.C.*, 145 S.Ct. 898, 922-23 (2025). Petitioners "have not surmounted the high standard that must be met to warrant such 'substantial intrusion' into the Executive's functioning." *Id* at 923.

Petitioners further assert that the Region has "effectively repeated" its previous response to comments that documents reflecting "technical assistance" need not be included in the administrative record. Petition at 16. Petitioners further assert that by failing to reference the term "technical assistance" in the RRTC, the Region has "failed to provide the needed clarity as to the full scope and nature of the information and data exchanged during the pre-application phase, rending the administrative record incompetent for this Board's review of Petitioner's arguments." *Id.*

The Board stated in a footnote that the Region's definition of "technical assistance" is unclear and its use as a basis for excluding documents from the administrative record is questionable absent further explanation. 2024 EAB Order at n. 20. The Board was clearer in the body of the 2024 EAB Order when it stated that the Region's reliance on "technical assistance" was untethered to the applicable regulatory language. *Id* at 45.

Presumably due to the Board's clear admonition in the body of the 2024 EAB Order, the Region is no longer relying on the argument that documents reflecting "technical assistance" provide a sufficient basis to keep such documents out of the administrative record. Instead, the Region stated that it performed a detailed search and has included all applicable documents in the administrative record. Determination on Remand at 3; *See also* RRTC #185.

This approach properly focuses on the regulatory requirements of 40 C.F.R. § 124.9(b)(1), which identifies the materials that must be included in the administrative record. The 2024 EAB Order does not order the Region to define the term "technical assistance," but instead orders the Region to apply the correct legal standard for developing the administrative record and ensure the record contains all required materials accordingly. *See* 2024 EAB Order at 46.

Most importantly, Petitioners' argument that the record remains incomplete after supplementation is entirely conclusory, and entirely unsupported. Mere speculation of missing documents is not sufficient to sustain a challenge to the completeness of the administrative record. *See Xerces Soc'y for Invertebrate Conservation v. Shea*, 682 F.Supp.3d 948, 955 (D. Or. 2023). The Region has complied with the Board's order. Petitioners have failed to meet their burden to show that documents have been excluded from the administrative record such that review is warranted.

Given the Region's thorough search, substantial supplementation of the record, and Petitioners' failure to identify a basis to believe documents are missing from the record, there is no basis for finding the administrative record incomplete or for granting review on this issue.

IV. The Board Should Deny Review of Petitioners' NHPA Section 106 Claim.

As discussed in Section I.C above, Petitioners' NHPA claim is outside the scope of the Board's review. Appeals by any party must be "limited to the issues considered on remand any

modifications made to the permits as a result of the remand." 2024 EAB Order at n. 23. The scope limitations are not discretionary—they are jurisdictional and binding.

The Board further limited the issues OST could raise from its Original Petition to: (1) the SDWA issues addressed in the Original Petition, and (2) OST's *de facto* rulemaking claim. *Id*. All other issues raised in the Original Petition were finally decided by the Board in the 2024 EAB Order, including the NHPA section 106 claim which was decided by the 2023 EAB Order and expressly incorporated by reference in the 2024 EAB Order. *Id* at 23, n. 24. The doctrine of administrative finality precludes relitigating that resolved claim.

Even if the NHPA claim were otherwise within the scope of this proceeding—which it is not—Petitioners' arguments fail on the merits. As shown below: (1) contrary to Petitioners' assertion, the NRC license remains valid and in effect, and the lead federal agency remains in compliance with the NHPA; (2) the open issue at the Atomic Safety and Licensing Board ("ASLB") concerns NRC's application regulations—not the NHPA— and, in any event, the issues raised have already been decided by the Board; and (3) the judicial decisions cited by Petitioners rely on superseded statutory language and materially distinguishable facts, and thus fail to meet Petitioners' burden to demonstrate that Board review is warranted.

A. The NRC Remains in Compliance with the NHPA

The Petition asserts that "the NRC license for the proposed Dewey-Burdock Project, upon which the NHPA compliance was based, has expired." Petition at 19. This is not true. Under applicable NRC regulations,

> if at least 30 days before the expiration of an existing license authorizing any activity of a continuing nature, the licensee files an application for a renewal or for a new license for the activity so authorized, the existing license will not be deemed to have expired until the application has been finally determined.

10 C.F.R. §2.109(a); *See also* Powertech (USA) Inc.; Dewey-Burdock In-Situ Uranium Recovery Facility; License Renewal Application, NRC, 89 Fed. Reg. 65401 (Aug. 9, 2024) ("The license SUA-1600 will not be deemed to have expired until the application has been finally determined").

Additionally, the programmatic agreement entered into pursuant to the NRC's issuance of the original NRC license has not expired. *See* Programmatic Agreement Among U.S. Nuclear Regulatory Commission, U.S. Bureau of Land Management, South Dakota State Historic Preservation Office, Powertech (USA) Inc., and Advisory Council on Historic Preservation Regarding the Dewey-Burdock In Situ Recovery Project Located in Custer and Fall River Counties, South Dakota dated March 19, 2014 ("Programmatic Agreement" or "PA") (Attachment 1).[4] Specifically, the PA provides that:

> After the termination of this PA and until the NRC completes consultation and a new PA is executed or the NRC has requested, taken into account, and responded to the comments of the [Advisory Council on Historic Preservation] under 36 CFR § 800.7(c)(4), Powertech is required to follow the terms and conditions of this PA for current ground-disturbing activities and is not permitted to begin any such activities in new areas.

Id at Section 16(c). Thus, the protective measures mandated by the original NHPA review remain binding on Powertech until a new review is completed by the NRC pursuant to the license renewal proceedings.

Even if the PA could be properly viewed as expired, such expiration would be not dispositive in determining the NRC's compliance with the NHPA.[5] It is true that "[c]ompliance

[4]Ordinarily consideration of petitions is limited to the administrative record. *See, e.g.*, *James Madison Ltd. By Hecht v. Ludwig*, 82 F.3d 1085, 1095 (DC Cir. 1996). Here, Petitioners have made reference to the expiration of the Programmatic Agreement and NRC License in the Petition in support of their claims that the Region failed to complete its NHPA obligations. Petition at 20. To the extent the Board entertains the merits of Petitioners' argument, it is appropriate to review the Programmatic Agreement and NRC License, despite falling outside the administrative record, as necessary background information to evaluate Petitioners' claims. *James Madison Ltd.*, 82 F.3d at 1095.

[5] Regardless of whether the Programmatic Agreement is "expired and is no longer in effect" for purposes of NRC license renewal, as Petitioners claim, its status is inconsequential for purposes of this proceeding on the UIC

with the procedures established by an approved programmatic agreement satisfies the agency's section 106 responsibilities for all individual undertakings of the program covered by the agreement until it expires or is terminated by the agency." 36 C.F.R. § 800.13(b)(2)(iii); *see also* Petition at 23. Despite an attempt by Petitioners to imply otherwise, neither the NHPA nor its implementing regulations include a corollary that expiration of a PA immediately puts an agency out of compliance. Petition at 23. Section 106 of the NHPA is a procedural statute that requires only that the agency "take into account the effect of the undertaking on any historic property" prior to issuance of a permit. 54 U.S.C. § 306108. Alternate procedures, such as programmatic agreements, may be used to satisfy "all or part" of an agency's obligations under Section 106. 36 C.F.R. § 800.14. In the original Section 106 evaluation, the NRC evaluated and took into account the impacts on an extensive number of properties identified pursuant to a survey that was endorsed by the DC Circuit as compliant with the NHPA. Programmatic Agreement at Appendix B, Table 1:0; *Oglala Sioux Tribe v. U.S. NRC*, 45 F.4th 291, 306 (DC Cir. 2022). NRC also identified that effects on some properties could not be determined until construction began, and implemented a phased approach that would require additional consultation if, and only if, such additional sites are discovered; again endorsed as compliant by the DC Circuit. *Oglala Sioux Tribe*, 45 F.4th at 306.

Section 9.8 of Powertech's NRC license prohibits all ground disturbing activities not evaluated by the NRC in accordance with the NHPA and prohibits ground disturbing activities in the vicinity of any newly discovered cultural resources. SUA-1600, Amendment 3 at 9.8, ADAMS Accession No. ML20276A164 ("NRC License") (Attachment 2). Thus, Powertech is prohibited from engaging in new ground disturbing activities, and unevaluated properties cannot be impacted

permits. The terms and requirements of the PA are effectively incorporated in the Class III and Class V permits and remain in full force. See Region 8, U.S. EPA, Reissued Class III Area Permit, XIV.A at 81-82 (Nov. 24, 2020) ("Class III Permit"); Region 8, U.S. EPA, Reissued Class V Area Permit, IX.A at 41 (Nov. 24, 2020) ("Class V Permit").

unless and until a new programmatic agreement is executed pursuant to the NRC's new license renewal undertaking, in compliance with the NHPA.

Petitioners further state that the NRC's initiation of a new programmatic agreement consultation process and acknowledgement of its requirement to do so pursuant to license renewal amounts to an admission that its NHPA obligations are "not satisfied." Petition at 22. Petitioners admit, however, that this new NHPA process is linked to the NRC's license renewal process. *Id*. License renewal is a new undertaking that requires its own NHPA consultation independent of the initial license approval, which was already finally decided after litigation extending to the DC Circuit. 36 C.F.R. § 800.16(y) (*defining* "undertaking" to include any project requiring a "Federal permit, license or approval"), *see also*, National Historic Preservation Act (NHPA) Section 106 Considerations for Operating Reactors, NRC (June 14, 2023), *available at* https://www.nrc.gov/docs/ML2313/ML23132A138.pdf (in which the NRC interprets NHPA consultation requirements as applying to reactor license renewals). Petitioners make no attempt to explain or provide authority for their position that new undertakings invalidate earlier NHPA consultations that underly existing licenses and permits. Powertech is not aware of any such authority, and, in fact, such a position would lead to absurd results. Under such reasoning, if an agency in charge of an ancillary permit with a 10-year lifespan designates another agency with more direct authority over the project as the lead for NHPA consultation, but the lead agency's permit has only a 5 year lifespan, then the agency's NHPA obligations would be invalidated half way through the life of the license. This would undermine the purposes of allowing consolidated reviews including "increased efficiency in coordinating and communicating with consulting parties, less duplicative analyses and paperwork, and more clarity and consistency in reaching findings and determinations." Frequently Asked Questions About Lead Federal Agencies in

Section 106 Review, ACHP, *available at* https://www.achp.gov/digital-library-section-106-landing/frequently-asked-questions-about-lead-federal-agencies (accessed Apr. 29, 2025).

For the forgoing reasons, the NRC's initial NHPA review remains valid and thus the Region's review is also valid.

B. The ASLB Proceeding Does Not Relate to the NHPA and the Open Issue Has Already Been Decided by the Board.

Petitioners assert that a live question before the ASLB regarding identification of cultural resources is evidence that NHPA compliance is incomplete. Petition at 23. The live question at the ASLB concerns not the agency's compliance with the NHPA but rather Powertech's compliance with broad NRC regulations designed to implement an entirely different statute, NEPA. Memorandum and Order (Granting, in Part, Organizational Petitioners' Request for Hearing and Denying Henderson's Request for Hearing), LBP-25-03 at 27-38 (Jan. 31, 2025) (Attachment 38 to Petition) ("ASLB Order"). The applicable NRC regulation requires the applicant to submit an environmental report with its license renewal application that broadly contains "a description of the environment affected" and includes a cross reference to now withdrawn 1984 Council on Environmental Quality ("CEQ") NEPA implementing regulations. 10 C.F.R § 51.60 (*cross referencing* 10 C.F.R. § 51.45); *See also* 10 C.F.R. § 51.10 and 51.14(b) (*cross referencing* the 1984 version of 40 C.F.R. § 1508.8).[6]

With respect to cultural resources, NEPA requires agencies to "take a 'hard look' at 'every significant aspect of the environmental impact' of a proposed major federal action." *Oglala Sioux Tribe*, 45 F.4th at 300 (*quoting Indian River Cnty. v. United States DOT*, 945 F.3d 515, 533 (DC

[6]Though the Board does not need to reach the legality of the NRC's NEPA implementing regulations in this proceeding, Powertech disputes the NRC's authority to rely on CEQ's long since superseded, and now withdrawn, regulations, and to shift the agency's NEPA obligations onto applicants prior to initiation of agency review. Moreover, CEQ's withdrawal of all prior versions of its NEPA implementing regulations, based on its lack of rulemaking authority, post-dates the ASLB's decision. Removal of [NEPA] Implementing Regulations, 90 Fed. Reg. 10610 (Feb. 25, 2025).

Cir. 2019)). While an agency does not necessarily violate NEPA when it is unable to acquire information about cultural resources, the standard is different than the NHPA's requirement to "make a reasonable and good faith effort to carry out appropriate identification efforts." *Id;* 36 C.F.R. § 800.4(b)(1). Whereas the ASLB previously held that the NRC met its NHPA obligations with respect to tribal consultation in 2017, it remanded the agency's NEPA obligations on the same point again for further efforts to obtain the relevant information and the NEPA issues were only resolved when the DC Circuit finally concluded in 2022 that continued engagement with OST would be "utterly pointless." *Oglala Sioux Tribe*, 45 F.4th at 297-98 (*explaining* the history of the Dewey-Burdock Project at the ASLB) and at 301 (*stating* further remand of the NEPA issue is not warranted because future engagement with OST would be "utterly pointless").

Based on the forgoing it is clear that the open question at the ASLB is irrelevant to this appeal for two reasons: (1) the regulation at issue pertains only to the information the NRC requires to be provided in a license application, not the agency's compliance with the cultural resources requirements of NEPA or NHPA and (2) even if the regulation at issue in the ASLB proceeding did pertain to the agency's compliance, it is limited only to the significantly broader requirements of NEPA, not the NHPA which is at issue here.

Additionally, Petitioners' argument before the ASLB relies on the lack of participation by OST in the prior cultural resources survey and the existence of an entirely new, post-decisional document for an entirely different project by a different project proponent (unrelated to Powertech), located in a different state—2021 Crow Butte cultural resources survey protocol—that was agreed between OST and NRC. ASLB Order at 34, n. 127. The Board has definitely dispensed of these arguments in the 2023 EAB Order. With respect to the 2021 Crow Butte survey protocol, the Board held that the survey protocol is "not relevant to the question of the Region's

compliance with the NHPA" in part because it "was developed for a different facility, located in a different state, for a different permit proceeding." 2023 EAB Order at 6. With respect to the lack of Tribal participation, the Board agreed with the DC Circuit's conclusion that the lack of participation by OST under the circumstances did not undermine the adequacy of the NHPA review. *Id* at 20-29.

For the forgoing reasons, the ASLB proceeding is irrelevant to the question at hand.

C. NHPA Section 106 Does Not Require Fresh Consultation Under the Present Circumstances

Petitioners' base their conclusion that the Region had an ongoing NHPA obligation when considering the narrow remand instructions of the 2024 EAB Order on two cases: (1) *Morris County Trust for Historic Preservation v. Pierce*, 714 F.2d 271 (3rd Cir. 1983) and (2) *Vieux Carre Property Owners, Residents and Associates, Inc. v. Brown*, 948 F.2d 1436 (5th Cir. 1991).

In *Morris County*, the Court held that "NHPA is applicable to an ongoing project at any stage where a Federal agency has authority to approve or disapprove Federal funding and to provide meaningful review of both historic preservation and community development goals." *Morris County*, 714 F.2d at 280. Critically, this conclusion was based on two regulatory definitions that no longer exist. As stated by the Court,

> Significantly, Advisory Council [on Historic Preservation] regulations define "decision" as "the exercise of or the opportunity to exercise discretionary authority by a federal agency at any stage of an undertaking where alterations might be made in the undertaking to modify its impact upon National Register and eligible properties." 36 C.F.R. § 800.2(h) (1982). "Undertaking" is defined by the Advisory Council as "any Federal, federally-assisted or federally-licensed action, activity, or program or the approval, sanction, assistance, or support of any non-Federal action, activity, or program. Undertakings include new and *continuing projects*…" 36 C.F.R. § 800.2(c) (1982).
>
> Read together, these Advisory Council regulations require that NHPA be applied to ongoing Federal actions as long as a Federal agency has opportunity to exercise authority at any stage of an undertaking where alterations might be made to modify its impact on historic preservation goals.

Id.

Vieux Carre quoted a portion of the above quotation from *Morris County* in reaching the same conclusion. Following the 1992 statutory revisions to the NHPA, the Advisory Council on Historic Preservation ("ACHP") reorganized its regulations, putting definitions in the new section 800.16, and simultaneously removed the definition of "decision" and revised the definition of "undertaking" to match the new statutory definition. Protection of Historic Properties, ACHP, 64 Fed. Reg. 27044, 27083 (May 18, 1999). As noted by the 9th Circuit in 2018,

> The statutory definition of "undertaking" dates from 1992. Prior to that, it was defined by the [ACHP], the agency charged with implementing the NHPA, to include "continuing projects, activities, or programs and any of their elements not previously considered under section 106." 36 C.F.R. § 800.2(o) (1992). But that definition was superseded by 54 U.S.C. § 300320(3), which omits the reference to continuing projects. The regulatory definition now conforms to the statutory definition. *See* 36 C.F.R. § 800.16(y). We therefore disagree with the [Havasupai] Tribe that the current definition of "undertaking" encompasses a continuing obligation to evaluate previously approved projects.

Havasupai Tribe v. Provencio, 906 F.3d 1155, 1164 (9th Cir. 2018).

Even if Petitioners' interpretation had not been superseded by statute, the vastly different circumstances in *Morris County* and *Vieux Carre* demonstrate the inapplicability of their conclusions to the present facts. *Morris County* involved Department of Housing and Urban Development ("HUD") involvement in an urban renewal project. *Morris County*, 714 F.2d at 273. HUD provided funding for the redevelopment via a loan and capital grant contract between 1969 and 1982 and via a short-term, direct-financing Federal loan thereafter. *Id*. HUD approved an Urban Renewal Plan in 1968 prior to signing the initial contract and, as determined by the Court, until 1980 a provision in the contract required the locality to provide HUD with data prior to any proposed action under the project and HUD had a continuing obligation to evaluate each such proposed action for compliance with federal law. *Id* at 273, 278. The action involved whether NHPA review was required prior to proposed demolition of a building in 1980 that had been

included in the original 1969 plan that was reviewed by HUD but was not designated in the National Register of Historic Places until after HUD's initial review. *Id* at 273. *Vieux Carre* involved construction of a park in a historic district which, due to a misclassification by the Army Corps of Engineers, NHPA review had not yet been conducted at the time construction of the park was substantially complete. *Vieux Carre*, 948 F.2d at 1439-40. The Court found nonetheless that the Army Corps may still be able to offer some form of relief, if only trivial, by completing the NHPA review in this late stage. *Id* at 1446-47.

Unlike *Morris County*, in which the Court found that HUD had a clear obligation to reevaluate each action proposed based on the most recent data, the Region has no clear authority to reevaluate the permit terms. Here, the Region was acting pursuant to very narrow instructions from the Board that did not extend to reconsidering previously reviewed actions that the Board already resolved to the extent such actions were not impacted by supplementing the administrative record. Also, unlike *Morris County*, there has been no change to the status of the historic or cultural resources here that would render the prior review deficient. The only alleged change is not to the status of any resources but rather to OST's purported willingness to aid in identifying them, an issue the Board has already disposed of in the Region's favor.

Unlike *Vieux Carre*, in which the applicable agency had previously failed in its duty to conduct an NHPA review and the Court was examining whether any opportunity remained to salvage its error, here the Region, through the NRC, has conducted a review that was endorsed by both this Board and the DC Circuit. Petitioners also claim that the Region has an ongoing obligation to rectify the NHPA review because there was no lawful basis for using a programmatic agreement, however, again both this Board, in the 2024 EAB Order, and the DC Circuit in *Oglala*

Sioux Tribe¸ endorsed the previously completed NHPA review, including the programmatic agreement, which is not eligible to be relitigated in this proceeding.

For the forgoing reasons, Petitioners' proposed standard for the Region's NHPA obligations must be denied or, in the alternative, the Region's review on remand should not be viewed as an opportunity in which the Region had discretion to revisit the NHPA. Accordingly, the Region had no obligation to undertake separate identification efforts under the NHPA, and Petitioners have failed to identify any deficiency in the NRC's or Region's compliance.

Conclusion

For the foregoing reasons the Board must dismiss the Petition.

Respectfully submitted,

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Dated: May 12, 2025

STATEMENT OPPOSING ORAL ARGUMENT

Powertech opposes additional oral argument in this case. OST had the opportunity to present arguments before the Board in March 2024. Following the Board's partial remand, the Region complied with the Board's remand order and corrected defects in the administrative record, but review of the documents added to the record did not lead to changes in the permits. Contrary to Petitioners' assertion that the issues are complex, the remaining issues should be decided solely on the briefs because Petitioners have not met their burden of demonstrating that review is warranted.

STATEMENT OF COMPLIANCE WITH WORD LIMITATION

This petition for review complies with the requirement that petitions for review not exceed 14,000 words. This petition for review, excluding attachments, is approximately 12,166 words in length.

TABLE OF ATTACHMENTS

1. Programmatic Agreement Among U.S. Nuclear Regulatory Commission, U.S. Bureau of Land Management, South Dakota State Historic Preservation Office, Powertech (USA) Inc., and Advisory Council on Historic Preservation Regarding the Dewey-Burdock In Situ Recovery Project Located in Custer and Fall River Counties, South Dakota dated March 19, 2014.

2. Materials License, SUA-1600, Amendment No. 3, ADAMS Accession No. ML20276A164 (Apr. 8, 2024).

CERTIFICATE OF SERVICE

I certify that the foregoing RESPONSE OF POWERTECH (USA) INC. TO PETITION FOR REVIEW in the matter of Powertech (USA) Inc., Appeal No. UIC 25-01, was filed electronically with the Environmental Appeals Board's E-filing System and served by email on the following persons on May 12, 2025.

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