

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

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

PETITION FOR REVIEW

Comes now the Oglala Sioux Tribe, Black Hills Clean Water Alliance, and NDN Collective and petitions the Environmental Appeals Board to review the Environmental Protection Agency Region 8's issuance of an Underground Injection Control (UIC) Class III area permit and Class V area permit for the Powertech (USA) Inc. Dewey-Burdock In-Situ Recovery Project in Custer and Fall River Counties, South Dakota.

April 11, 2025

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INTRODUCTION AND ISSUES PRESENTED FOR REVIEW

Pursuant to 40 C.F.R. § 124.19(a), Oglala Sioux Tribe, Black Hills Clean Water Alliance, and NDN Collective (“Petitioners”) petition for review of the Environmental Protection Agency’s (“EPA”) issuance of an Underground Injection Control (“UIC”) Class III Area Permit (Permit No. SD31231-00000) and Class V Area Permit (Permit No. SD52173-00000) issued to Powertech (USA) Inc. (“Powertech” or “applicant”) for the proposed Dewey-Burdock Uranium In-Situ Recovery Project (“Project”) on March 14, 2025 by EPA Region 8. The permits at issue in this proceeding are required for otherwise prohibited activity. The permits authorize Powertech to inject lixiviant and wastewater into the local aquifer to conduct an in-situ leach (“ISL”) uranium mining operation in the Black Hills of South Dakota.

As discussed in the administrative record prepared by EPA Region 8, the permits subject to this Petition for Review have been reissued by EPA Region 8 in response to the Environment Appeal Board’s (“EAB”) September 3, 2024 Order Denying Review in Part and Remanding in Part, UIC Appeal No. 20-01, 2024WL4125624 (Sept. 3, 2024 EAB Order). *See* EPA Region 8’s Determination on Remand (Administrative Record document # 1151). As stated in the Sept. 3, 2024 EAB Order:

Accordingly, the Board remands the permits in part and directs 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.

Sept. 3, 2024 EAB Order at 46. The Board further ruled that:

Anyone dissatisfied with the Region’s decision on remand must file a petition seeking Board review in order to exhaust administrative remedies under 40 C.F.R. § 124.19(l). Any such appeal shall be limited to the issues considered on remand and any modifications made to the permits as a result of the remand.

To be clear, because of the errors identified in this decision, the Board is not in a position at this time to reach the merits of the remaining issues in the petition that involve legal and factual questions. The Board preserves for review: (1) the SDWA issues addressed in the petition, including the Tribe's challenges to the Region's cumulative effects analysis under EPA's UIC regulations at 40 C.F.R. § 144.33(c)(3), and (2) the Tribe's de facto rulemaking claim. To the extent that these preserved issues remain after remand, the Tribe may, if it so chooses, raise these issues in a new petition seeking review of the Region's action on remand. For efficiency purposes, the Tribe, the Region, or Powertech may incorporate by reference any arguments raised in this appeal concerning the preserved issues into any new appeal arising from the remand action.

Id. at 46-47 n. 23.

Through this newly filed Petition for Review, Petitioners contend that EPA's permitting analysis is based on clearly erroneous findings of fact and conclusions of law and are counter to EPA regulations and obligations under the Safe Drinking Water Act ("SDWA")(42 U.S.C. §§ 300f, *et seq.*), the National Historic Preservation Act ("NHPA")(16 U.S.C. §§ 470, *et seq.*), and the Administrative Procedure Act ("APA")(5 U.S.C. §§ 701, *et seq.*). Petitioners expressly adopt and incorporate by reference the arguments made in the original Petition for Review and Reply in support of the Petition for Review concerning (1) the SDWA issues addressed in the petition, including the Tribe's challenges to the Region's cumulative effects analysis under EPA's UIC regulations at 40 C.F.R. § 144.33(c)(3), and (2) the Tribe's de facto rulemaking claim, as expressly contemplated by the Board.

As updated through this Petition, and incorporating by reference the relevant portions of the original Petition as referenced herein with relevant attachments, Petitioners present the following challenges:

(1) Failure to demonstrate compliance with the Safe Drinking Water Act and implementing regulations, including 40 CFR § 144.12, 40 CFR § 146.33(a), and 40 CFR § 146.6(a)(ii), regarding demonstration of ability to contain the mining fluid within the exempted aquifer and protect underground sources of drinking water. *See* original Petition for Review at 34-45, with relevant attachments.

(2) Failure to abide by the procedural rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. §§ 701, *et seq.* See original Petition for Review at 45-52, with relevant attachments.

(3) Failure to demonstrate compliance with the requirements of the National Historic Preservation Act, 16 U.S.C. §§ 470, *et seq.* and implementing regulations;

(4) Failure to demonstrate compliance with the cumulative effects analysis required by 40 C.F.R. § 144.33(c)(3). See original Petition for Review at 25-31, with relevant attachments.

Petitioner Oglala Sioux Tribe filed two separate sets of written comments during the permitting process (Comments attached to the original Petition for Review as Attachments 1 and 2) at issue here. The Oglala Sioux Tribe is a body politic comprised of approximately 41,000 citizens with territory of over 4,700 square miles on the Pine Ridge Reservation in the southwestern portion of South Dakota. The Tribe is the freely and democratically-elected government of the Oglala Sioux people, with a governing body duly recognized by the Secretary of Interior. The Tribe is the successor in interest to the Oglala Band of the Teton Division of the Sioux Nation, and is a protectorate nation of the United States of America. The Oglala Band reorganized in 1936 as the “Oglala Sioux Tribe of the Pine Ridge Indian Reservation” (“Oglala Sioux Tribe” or “Tribe”) under section 16 of the Indian Reorganization Act of June 18, 1934, ch. 576, 48 Stat. 987, 25 U.S.C. § 476, and enjoys all of the rights and privileges guaranteed under its existing treaties with the United States in accordance with 25 U.S.C. § 478b.

The lands encompassed by the Powertech proposal are within the Tribe’s aboriginal lands and within the boundaries of the Great Sioux Reservation, as defined in the Treaty of Fort Laramie of April 29, 1868. (15 Stat. 635). These unceded treaty lands contain significant historic and cultural resources, such as burials, items of cultural patrimony, artifacts, sites, and other material culture, etc., that belong to and/or could be associated with the Tribe upon proper identification, documentation, evaluation, and recordation.

By enacting NEPA (42 U.S.C. §§ 4321 *et seq.*), NAGPRA, (25 U.S.C. §§ 3001 *et seq.*), NHPA (16 U.S.C.S. §§ 470 *et seq.*) and other statutes, the United States has assured that the Tribe's cultural resources will be protected, even when they are not within reservation boundaries. Impacts to significant cultural and historic resources have been confirmed by incomplete site surveys, but there have been no competent surveys carried out by the Tribe or persons with relevant cultural expertise to identify and ensure proper resource protection. Further, the Tribe owns land in the direct vicinity of the proposal which could be negatively affected through groundwater contamination. As such, the Tribe has several protected interests. Harm to the water resources, burials and artifacts, and ongoing cultural activities are foreseeable and imminent due to the failure of the applicant and EPA Region 8 staff to complete steps required to properly survey and judge the significance of these important resources.

In short, this petition seeks to avoid irreparable injury to the very identity of the Tribe, caused by the actions of the applicant and condoned by EPA personnel with federal trust duties to the Tribe. The incomplete consideration of significant cultural resources, historic properties, and prehistoric artifacts in the Tribe's treaty and aboriginal territory implicates important tribal interests such that the mining activities allowed by EPA's permitting actions cause significant harm to the Tribe's inherent and federally-recognized interests.

Petitioner Black Hills Clean Water Alliance ("BHCWA") is a nonprofit corporation based in Rapid City, South Dakota, that is concerned with protecting the Black Hills' water, land, air, wildlife and communities from the adverse impacts of hard rock mining. BHCWA is a coalition of organizations, anglers, conservationists, scientists, and Native Americans dedicated to protecting the communities, wildlife, land, air, water and Native American resources of the Black Hills. Members of BHCWA have used, enjoyed, and valued the area of the Dewey-

Burdock Mine Project, including the Project site, for many years. Members of BHCWA view and photograph scenery and wild plant life, appreciate and value the cultural and historical resources at the site, and generally enjoy using the area of the Project for recreational, cultural, historical, conservation, and aesthetic purposes. Members of BHCWA intend on continuing to use and value the lands near, at, and affected by the Project in future years. These uses will be immediately, irreparably, and significantly harmed by the Project and related operations.

Petitioner NDN Collective is a nonprofit corporation based in Rapid City, South Dakota that is concerned with building the collective power of Indigenous Peoples, communities, and Nations to exercise our inherent right to self-determination, while fostering a world that is built on a foundation of justice and equity for all people and Mother Earth. NDN Collective is staffed overwhelmingly by Indigenous leaders from across the continent and enrolled members of federally-recognized Tribes and coordinates with Tribal governments and communities in building sustainable outcomes and honoring our human rights. NDN Collective achieves these outcomes primarily through increasing philanthropic and capital investment in Indigenous-led organizations, policy advocacy, skill-building, agenda setting, activism, and political actions, among other means. Members of NDN Collective have used, enjoyed, and held sacred the area of the Dewey-Burdock Mine Project, including the Project site, for thousands and thousands of years. To this day, these members view and photograph scenery and wild plant life, appreciate and value the cultural and historical resources at the site, and generally enjoy using the area of the Project for recreational, cultural, ceremonial, historical, conservation, food and medicinal plant harvesting, and aesthetic purposes. Members of affected Tribes and NDN Collective personnel intend to continue exercising their treaty rights by using and valuing the lands near, at,

and affected by the Project in future years. These uses will be immediately, irreparably, and significantly harmed by the Project and related operations.

THRESHOLD PROCEDURAL REQUIREMENTS

Petitioners satisfy the threshold requirements for filing a petition for review under 40 C.F.R. part 124:

1. Petitioner Oglala Sioux Tribe provided evidence that establishes standing to petition for review of the permit decision in its June 19, 2017 and December 9, 2019 written comments submitted while participating in the public comment period on the permit (Attachments 1 and 2). *See* 40 C.F.R. § 124.19(a). The information exchanged during the EPA-terminated effort to engage government-to-government consultation also confirms administrative standing. Petitioner Black Hills Clean Water Alliance provided written comments to EPA Region 8 on June 19, 2017 (Administrative Record Document # 637, Bates 078603-79308), on June 16, 2017 (Administrative Record Document #645, Bates 082953-08324), and on December 19, 2019 (Administrative Record Document #574, Bates 061572-61577). *See* 40 C.F.R. § 124.19(a). Members and staff of NDN Collective participated in the October 5, 2019 public hearing on the draft permits held by EPA in Hot Springs, SD (transcript located at Administrative Record Document #659). *See* 40 C.F.R. § 124.19(a).

2. The issues raised in the Petition were raised during the public comment period and during attempts at consultation, and therefore were preserved for review. Specifically, and as discussed *infra*, both sets of comments submitted by Petitioners Oglala Sioux Tribe and Black Hills Clean Water Alliance in 2017 and 2019 detail EPA Region 8's lack of a compliant cumulative effects analysis, the lack of compliance with the consultation and archaeological/cultural resource protection and mitigation requirements of the NHPA, and failure

to comply the statutory and regulatory requirements of the SDWA and the procedural rulemaking requirements of the APA. Further, the comments submitted in both 2017 and 2019 included a number of attachments in support of the comments, including expert reports, hearing transcripts, and internal EPA documents obtained via the Freedom of Information Act (“FOIA”). Further, as discussed herein, because EPA Region 8 determined in its discretion not to provide any public comment opportunities with respect to its reissuance of the permits on March 14, 2025 – despite the nearly five and half years since the last opportunity for public comment on the permits at issue in this matter – the issues addressed herein that have arisen since that time were not reasonably ascertainable or reasonably available in 2017 and 2019. *See* 40 C.F.R. § 124.13 (Petitioners “must raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period (including any public hearing) under § 124.10.”).

BACKGROUND¹

EPA Region 8 approved a UIC Program Area Permit to construct and operate up to 14 Class III injection wellfields within the Dewey-Burdock Project Area, involving surface facilities and ground disturbance that includes construction of approximately 1,461 separate injection wells, 869 separate production wells, and related operations/maintenance infrastructure. The 14 wellfields will be used for the injection of a chemical lixiviant to dissolve uranium from ore deposits in the underlying aquifer. EPA Region 8 has also granted a UIC Program Class V Area Permit allowing the construction and operation of up to four (4) deep injection wells within the

¹ The factual descriptions herein are taken from EPA permitting documents in the administrative record that describe the Project. Specifically, EPA’s Fact Sheets, Underground Injection Control Area Permit, Aquifer Exemption Record of Decision, and EPA Response to Comments. This same description was included in the original Petition for Review.

Dewey-Burdock Project Boundary to be used for the disposal of treated uranium ISL process wastewater into a separate underlying aquifer.

The uranium leaching process uses Class III injection wells to introduce a lixiviant into subsurface aquifers containing uranium ore deposits that leaches the uranium and multiple other toxic heavy metals from the ore deposits. Production wells pump the solution of groundwater and uranium-bearing lixiviant up to a processing plant, where the dissolved uranium is removed using an ion-exchange resin. After uranium removal, the solution is recirculated and reinjected into the aquifer via injection wells.

Once the ion-exchange resin is loaded with uranium, the loaded resin is stripped and the resulting barren resin is used again to recover more uranium. The uranium-bearing solution is pumped through a precipitation process, where the uranium is precipitated as a yellow, solid uranium oxide yellowcake. The yellowcake is then packaged in sealed containers for shipment to a site where it is further processed for use in electrical generation or nuclear weapons.

The solutions used in the Class III injection are eventually exhausted, treated, and the waste fluids from this process are injected into the proposed Class V deep injection wells or by disposed of via land application. Some, but not all, versions of the Powertech proposal involve radium settling ponds to remove radionuclide solids. There is no definite plan for disposal of radioactive solids or liquids.

In theory, the applicant is able to maintain hydraulic control of each Class III wellfield by injecting a lower volume of solution into the aquifer than the production wells remove. The difference between the volume of solution being removed and the volume being injected is the *wellfield bleed*. Bleed is defined as excess Class III operations (or restoration) solution withdrawn from the producing (or post-production) aquifer to maintain a cone of depression that

is assumed to continually pull native groundwater toward the center of the wellfield. Wellfield bleed is an additional waste fluid from the Class III operations.

Powertech plans to operate each Class III wellfield until uranium recovery is no longer economical. Powertech estimates that individual wellfields will operate for about 2 years. After the uranium production in each wellfield is complete, a groundwater restoration process begins for that aquifer. The contaminated groundwater is pumped from the aquifer and treated using reverse osmosis. The restoration process also uses a cone of depression that produces bleed fluids. The restoration bleed and the reject water from the reverse osmosis treatment are injected into the Class V deep injection wells. A definite plan to dispose of these radioactive and toxic solids has not been approved.

As described in detail in Petitioners' comments, and admitted by EPA Region 8, there is no evidence of any operator successfully restoring an aquifer used as a Class III uranium ISL well field to pre-mining conditions. Further, the permitting regime established by EPA Region 8 in this case allows Powertech to secure the permits without first demonstrating the ability for Class III and Class V wells to contain the uranium and heavy metal solution within the underlying aqueous geology. Instead, EPA Region 8 deferred consideration of relevant permitting factors until after final permitting, thereby avoiding public involvement and opportunity for comment.

Critically, EPA made no attempt to address mitigation or alternative design/siting of the proposed injection and waste facilities, and related infrastructure, even though the site is known to be replete with significant cultural resources (including burials) of great importance to the Lakota people, including Petitioners. No competent survey for cultural resources has occurred in

the areas proposed for the extensive drilling involved in construction and operation of the permitted injection wells.

ARGUMENT

Standard of Review

“[T]o establish that review of a permit is warranted, [40 C.F.R.] § 124.19(a) requires a petitioner to both state the objections to the permit that are being raised for review, and to explain why the [permitting authority's] previous response to those objections ... is clearly erroneous or otherwise warrants review.” *In re Puerto Rico Elec. Power Auth.*, 6 E.A.D. 253, 255 (EAB 1995). Further:

In evaluating a permit appeal, the Board examines the administrative record on which the permit was based to determine whether the permit issuer exercised his or her considered judgment. [...] Specifically, the permit issuer must articulate with reasonable clarity the reasons for its conclusions and the significance of the crucial facts it relied upon in reaching those conclusions. [...]. As a whole, the record must demonstrate that the permit issuer duly considered the issues raised in the comments and [that] the approach ultimately adopted by the [permit issuer] is rational in light of all information in the record.[...]

In re Avenal Power Center, LLC, 15 E.A.D. 384 (EAB 2011) (slip. op. at 4) (internal quotations omitted).

EPA Has Failed to Comply with the Administrative Procedure Act

EPA Region 8 has failed to include a complete record for this Board’s review of Petitioners’ arguments. Region 8 failed to address the Board’s order:

Accordingly, the Board remands the permits in part and directs 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.

Sept. 3, 2024 EAB Order, at 46. Instead of compliance, EPA Region 8 added a few documents and refused to reopen public comment.

A key defect remains unaddressed. In the original Petition, the Oglala Sioux Tribe asserted that EPA Region 8 violated the Administrative Procedure Act in conducting a de facto rulemaking with respect to the agency's regulatory requirements for UIC permitting. *See* Oglala Sioux Tribe Petition for Review at 45-52. Petitioners expressly adopt and incorporate by reference herein this argument relating to de facto rulemaking. *See* Sept, 3, 2024 EAB Order, at 46 n. 23. Instead of addressing the issue with a discussion as to the communications and information exchanged between the agency and the applicant and other members of the mining industry – to the exclusion of Petitioners and the public – EPA Region 8 instead simply restates its legal position that the communication and information exchange between the Applicant and EPA Region 8 was a normal pre-application process it follows in every circumstance with a potential permit applicant. Response to Comments ##183-185.

As discussed in the original Petition for Review, the proposed “guidance” is highly substantive in nature and establishes significant precedent on critical issues with respect to EPA's regulation of ISL uranium mines. For example, through negotiations with industry, EPA Region 8 effectively defined 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. Such decisions not only establish the equivalent of an obligatory policy for Region 8, but also have national policy implications and long-term environmental impacts. *See* AOR ZOI Definitions v3 6 20 2008 (Attachment 30 to original Petition for Review).

EPA Region 8 released emails in an overly cumbersome format (*see* EPA FOIA release cover letter apologizing for cumbersome format (Attachment 31 to original Petition for Review))

that describe the extent to which EPA engaged industry stakeholders but not the public. *See i.e.*, Powertech-EPA rulemaking on definitions (Attachment 32 to original Petition for Review at bates 0020)(bates stamp numbers added for clarity)(Powertech representatives thanking EPA staff for providing “new write-up for the Area of Review, Zone of Influence and Aquifer Exemption Boundary determinations” and requesting that the industry representatives “distribute to others as you deem appropriate.”). EPA attempts to characterize the discussions as designed to inform the operator of EPA requirements, but the emails demonstrate the opposite – the industry providing EPA its preferred regulatory definitions. *See* Attachment 32 to original Petition for Review at bates 0027 (EPA thanking industry and stating that “[y]our expertise and knowledge helped us out tremendously”); bates 0029 (EPA asking industry representatives the effect an excursion (leak) of toxic mining fluid under state law will have on a possible shut-down of the operation); bates 0031 (industry informing EPA that the industry’s lawyer will provide his “insight”); bates 0043 (confirming EPA staff has used the discussion with industry to create new requirements/guidelines that will be used for all future similar Class III applications)

EPA Region 8 included additional technical and weighty aspects of the discussion. For instance, EPA Region 8 staff discussed in depth with industry representatives broader aspects of the agency’s authority and how it should proceed. *See* Powertech Dewey Burdock emails (Attachment 33 to original Petition for Review)(bates stamps added for clarity) at 0071-0072 (EPA Region 8 and industry representatives discussing EPA’s “nebulous” authority over well field aquifer restoration and EPA Region 8 staff expressing its “shock and horror we found that our regulation 144.12(b)” allows EPA to take broad enforcement action in the case of leaks and communicating to industry representatives that “this has very big implications for where to

establish the proposed aquifer exemption boundary. We should have a big meeting to discuss what this means.”).

The emails also demonstrate that EPA developed its regulatory approach to allow the permits to issue first, then allow the applicant to demonstrate that the site was amenable to mining through a closed-door process. *Id.* at bates 0123-0125 (showing EPA Region 8 staff culling South Dakota regulations and developing its own regulatory to match the process – but without the benefit of any public participation); bates 0241-0242 (EPA Region 8 staff asking industry representatives to review and approve EPA requirements for formation testing programs).

Thus, as early as 2007, Region 8 management directed staff to improperly engage an *de facto* rulemaking process to draft changes to the UIC regulations without the benefit of the substantive and procedural protections of notice and comment rulemaking, and with an eye toward approving Powertech’s application. This process neglects the rulemaking requirements of the APA and the SDWA requirement that only the Administrator may promulgate SDWA regulations (*see* 42 U.S.C. § 300h(a)) and that “[a]ny regulation under this section shall be proposed and promulgated in accordance with section 553 of title 5 (relating to rulemaking)....” 42 U.S.C. § 300h(a)(2).

EPA Region 8’s Response to Comments documents fail to address with any specificity these examples of a category of omitted records that provide uncontroverted evidence that EPA Region 8 staff understood and acknowledged the unusual and precedential nature of their pre-application discussions with industry representatives. *See* Powertech-EPA rulemaking emails (Attachment 34 to original Petition for Review) at bates 0100 (“At last I have finished obsessing about this checklist for figures. It is in the DRAFT phase, so please let me know if it is helpful &

goes along with what you were anticipating. **You get to be the pioneering guinea pig that will make life easier for others following in your path.**”) (emphasis added); *see also* Attachment 33 to original Petition for Review at 0157 (EPA staff providing industry representatives documents and informing that the agency had “finally finished obsessing about this checklist for figures in the permit application. It is still in DRAFT form, so please let me know if it coincides with what you were thinking or if there is a way to make it more helpful for permit applicants”); bates 0240 (EPA staff indicating that the Powertech application submission will be a “test” for EPA’s new permitting requirements to “see how they hold up in reference to reality”).

In its newly developed Response to Comments #184, EPA Region 8 states, with respect to the discussions it had with Powertech and the industry that:

It is both necessary and appropriate for EPA to communicate with the applicant regarding the aquifer exemption boundary, as they have the information necessary to determine the appropriate AE boundary; here, they were required to provide information on commercial producibility of the ore deposits pursuant to 40 C.F.R. § 144.7(c)(1). Following review of the necessary information, EPA proposed the AE with a description of the boundary that the public had opportunity to comment on. The public also had the opportunity to comment on the underlying information that EPA relied on.

Response to Comment #184. However, this statement is inaccurate, as the agency has failed to include any of the pre-application information and discussions in the administrative record.

Petitioners have included examples of these exchanges, but only EPA Region 8 possesses the required complete record. As such, the agency has expressly failed to include in its administrative record the information and data provided by the Applicant during its year-long pre-application discussion in violation of 40 C.F.R. § 124.9(b)(1). This regulation specifically requires that the administrative record must include “[t]he application, if required, **and any supporting data furnished by the applicant**”) (emphasis added). Without this information, the administrative record is incomplete as to the pre-application Dewey Burdock-specific aquifer

exemption boundary, zone of influence, and are of potential effect discussions. Thus, contrary to EPA Region 8's assertions, the public has **not** had opportunity to comment on the underlying information that EPA Region 8 relied on.

EPA Region 8 also asserts that the public never raised any concerns regarding these aquifer exemption boundary, zone of influence, and are of potential effect topics in its comments on the permits. Response to Comments ## 183, 184, 185. This is false. The comments submitted by Petitioners specifically challenged EPA Region 8's methodology and its limitations regarding these concepts and resulting threats to area aquifers. *See, e.g.*, Petition for Review at 34-45, referencing Attachment 1 to original Petition for Review (2017 comments submitted by the Oglala Sioux Tribe) at 21-33; Attachment 2 to original Petition for Review (2019 comments submitted by the Oglala Sioux Tribe) at bates 0009 (discussing inadequate area of potential effect (APE)); 0049-0051 (discussing inadequate review of impacts from injection of mining fluids, including inadequate review of the zone of influence and aquifer exemption boundary); 00052 (discussing inadequate monitoring and corrective action procedures); 0054-0055 (discussing lack of key data for determining aquifer confinement); *see also* Black Hills Clean Water Alliance comments at Administrative Record Document # 637, bates 078604-078607 (discussing pump test data and transmission of mining fluids between aquifers), 078609-078611 (discussing inadequate evidence of confinement and excursions), 078617-078620 (discussing mining fluid migration, water quality impacts inside and outside ore zone, lack of confinement due to faults, fractures, and improperly abandoned boreholes, and inadequate restoration procedures).

These identified failures to protect aquifers in compliance with applicable law and regulation formed the basis for the original Petition for Review and they remain live issues in

this proceeding. Petitioners hereby expressly re-assert and incorporate by reference the Oglala Sioux Tribe's arguments in the original Petition for Review detailing violations of the Safe Drinking Water Act (SDWA) and applicable regulations. Petition for Review at 34-45, with relevant attachments. *See* September 3, 2024 Order Denying Review in Part and Remanding in Part, at 46 n. 23.

In the Sept. 3, 2024 EAB Order, the Board addressed EPA Region 8's legal arguments, effectively repeated in its new Response to Comments ## 183-185, that it was merely providing "technical assistance" to the Applicant in the preparation of the application. The Board specifically questioned the scope of EPA Region 8's "technical assistance" to the Applicant in the pre-application phase:

It is unclear what the Region means by "technical assistance," particularly with regard to the discussion Document. *See* Reg.'s Resp. Br. at 30; Oral Arg. Tr. at 80-84. That document discusses the relevant regulations governing the "area of review" and states "[t]he zone of endangering influence calculation in the regulations is not appropriate for an in-situ mining project, because the formula applies to injection wells that only inject, with no extraction taken into account." Discussion Document at 2; *see also* 2019 Fact Sheet at 30; Oral Arg. Tr. at 80-84. While, as discussed above, the Discussion Document is required to be part of the record, the Board observes that the Region's rationale for excluding a document from the record because it constitutes "technical assistance" remains questionable absent further elaboration from the Region as to how it defines "technical assistance" in the context of the interactions surrounding the permit decisionmaking.

Sept. 3, 2024 EAB Order at 44-45 n. 20. Despite this admonition, in its newly crafted Response to Comments, EPA Region 8 has failed to reference the term "technical assistance" and has thus failed to provide the needed clarity as to the full scope and nature of the information and data exchanged during the pre-application phase, rendering the administrative record incompetent for this Board's review of Petitioners' arguments.

The original Petition for Review addressed the proper remedy for this issue of an inadequate administrative record: "When the agency record is inadequate, 'the proper course,

except in rare circumstances, is to remand to the agency for additional investigation or explanation.” *Sierra Club-Black Hills Group v. U.S. Forest Service*, 259 F.3d 1281, 1289 (10th Cir. 2011) *quoting Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). Similarly, “if limitations in the administrative record make it impossible to conclude the action was the product of reasoned decisionmaking, the reviewing court may supplement the record or remand the case to the agency for further proceedings.” *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575 (10th Cir. 1994). The omission of relevant information from the record demonstrates that EPA’s refusal to consider an important aspect of the problems at hand warrants withdrawal of the permit and remand.

EPA Region 8’s Decisions Violate the National Historic Preservation Act

The federal courts have addressed strict NHPA mandates, 16 U.S.C. §§ 470, *et seq.*:

Under the NHPA, a federal agency must make a reasonable and good faith effort to identify historic properties, 36 C.F.R. § 800.4(b); determine whether identified properties are eligible for listing on the National Register based on criteria in 36 C.F.R. § 60.4; assess the effects of the undertaking on any eligible historic properties found, 36 C.F.R. §§ 800.4(c), 800.5, 800.9(a); determine whether the effect will be adverse, 36 C.F.R. §§ 800.5(c), 800.9(b); and avoid or mitigate any adverse effects, 36 C.F.R. §§ 800.8[c], 800.9(c). The [federal agency] must confer with the State Historic Preservation Officer (“SHPO”) and seek the approval of the Advisory Council on Historic Preservation (“Council”).

Muckleshoot Indian Tribe v. U.S. Forest Service, 177 F.3d 800, 805 (9th Cir. 1999). *See also*, 36 C.F.R. § 800.8(c)(1)(v)(agency must “[d]evelop in consultation with identified consulting parties alternatives and proposed measures that might avoid, minimize or mitigate any adverse effects of the undertaking on historic properties....”).

The Advisory Council on Historic Preservation (“ACHP”), the independent federal agency created by Congress to implement and enforce the NHPA, determines the methods for compliance with the NHPA’s requirements. *See National Center for Preservation Law v.*

Landrieu, 496 F. Supp. 716, 742 (D.S.C.), *aff’d per curiam*, 635 F.2d 324 (4th Cir. 1980). The

ACHP's regulations "govern the implementation of Section 106," not only for the Council itself, but for all other federal agencies. *Id. See also National Trust for Historic Preservation v. U.S. Army Corps of Eng'rs*, 552 F. Supp. 784, 790-91 (S.D. Ohio 1982).

NHPA Section 106 requires federal agencies, prior to approving any "undertaking," to "take into account the effect of the undertaking on any district, site, building, structure or object that is included in or eligible for inclusion in the National Register." 16 U.S.C. § 470(f). Section 106 applies to properties already listed in the National Register, as well as those properties that may be eligible for listing. *See Pueblo of Sandia v. United States*, 50 F.3d 856, 859 (10th Cir. 1995). Section 106 provides a mechanism by which governmental agencies may play an important role in "preserving, restoring, and maintaining the historic and cultural foundations of the nation." 16 U.S.C. § 470.

If an undertaking is the type that "may affect" an eligible site, the agency must make a reasonable and good faith effort to seek information from consulting parties, other members of the public, and Native American tribes to identify historic properties in the area of potential effect. 36 C.F.R. § 800.4(d)(2). *See also, Pueblo of Sandia*, 50 F.3d at 859-863 (agency failed to make reasonable and good faith effort to identify historic properties).

The NHPA also requires that federal agencies consult with any "Indian tribe ... that attaches religious and cultural significance" to the sites. 16 U.S.C. § 470(a)(d)(6)(B). Consultation must provide the tribe "a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects." 36 C.F.R. § 800.2(c)(2)(ii). The Tribe must be involved in all three efforts: 1) identifying historic or cultural

resources; 2) evaluating impacts on historic or cultural resources and those resources' eligibility for inclusion on the National Register of Historic Places (NRHP); and, 3) developing project alternatives or mitigation measures to protect those resources that are or may be eligible.

While the Board previously declined review of the arguments raised by the Tribe with respect to compliance with Section 106 of the National Historic Preservation Act (NHPA), that ruling was based on a finding that all Section 106 issues had been resolved by the U.S. Court of Appeals for the D.C. Circuit. November 16, 2023 Order Denying Motion to Amend Petition for Review, Denying Review on the Petition's National Historic Preservation Act Section 106 Issue, and Identifying Issues in the Petition Remaining for Resolution ("Nov. 16, 2023 EAB Order"), at 9 n. 8, 23-24. However, new circumstances demonstrate that the previous finding the NRC's compliance with the NHPA is no longer supported.

Specifically, as detailed herein, the NRC license for the proposed Dewey-Burdock project, upon which the NHPA compliance was based, has expired. Similarly, the Programmatic Agreement (PA) upon which NRC (and EPA Region 8) based its compliance with the NHPA, has similarly expired and is no longer in effect. Based on a renewal application and changed circumstances, the NRC, though its newly-appointed Atomic Safety and Licensing Board (ASLB), has granted standing to Petitioners here, and admitted Petitioners' new contentions in a new proceeding before that agency squarely challenging the competence of the NRC Staff's identification of, and evaluation of impacts to, cultural resources at the proposed Dewey-Burdock site. As part of this new proceeding, NRC Staff has conceded that it is no longer in compliance with the NHPA and that it must conduct additional consultation with the Tribe, as well as interested members of the public, including Petitioners here, in order to satisfy its

obligations under the NHPA. Notably, all of these events had occurred prior to the EPA Region issuance of the final UIC Permits at issue here on March 14, 2025.

As a result, because EPA Region 8 has wholly deferred to NRC for demonstrating compliance with the NHPA, given the changed circumstances detailed by the Board's Order, EPA Region 8 is also now out of compliance with the NHPA consultation requirements – rendering the UIC permits at issue here, unlawful.

As this Board has expressly recognized, EPA Region 8 has expressly deferred entirely to NRC for NHPA compliance:

In its response to comments, the Region explained that it chose to comply with its NHPA section 106 obligations by designating the NRC as the lead federal agency for the Dewey-Burdock project pursuant to 36 C.F.R. § 800.2(a)(2). Resp. to Cmts. at 309-11 (Cmt. #263). To effectuate the designation, the Region signed the Programmatic Agreement Among U.S. Nuclear Regulatory Commission, U.S. Bureau of Land and 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 (“Programmatic Agreement”), agreeing to its terms, and satisfied the terms of stipulation 7 of the Agreement by providing the signature page to all signatories and consulting parties under the Agreement. *Id.* at 310-11; *see* Letter from Darcy O'Connor, Dir. Water Div., Region 8, U.S. EPA, to John Tappert, Fed. Pres. Officer, NRC (Nov. 13, 2020) (Doc. 664) (“Region's NHPA Lead Agency Letter”); EPA Signature Page for Programmatic Agreement (digitally signed by Darcy O'Connor, Dir., Water Div., Region 8, U.S. EPA, on Nov. 13, 2020) (Doc. 665) (“EPA Signature Page”); Programmatic Agreement (Mar. 19, 2014) (Doc. 671).

Nov. 16, 2023 EAB Order at 6-7.

[T]he Region explained its designation decision, stating that “[h]aving a single agency serve as the lead, with input from other agencies as appropriate, promotes efficiency in government,” and that “a separate, parallel NHPA compliance effort would not meaningfully alter the protection of historic properties in connection with this undertaking.” Resp. to Cmts. at 310-311 (Cmt. #263).

Nov. 16, 2023 EAB Order at 9.

However, as conceded in a letter to Petitioners here, the NRC license has expired, along with the PA, which must now be renegotiated and reformulated:

The NRC staff also executed a Programmatic Agreement (PA) on April 7, 2014, which satisfied the NRC's obligations under the Section 106 process of the NHPA for the issuance of NRC license SUA-1600. The 2014 PA can be found in Enclosure 1 or at ML21005A099. Signatories to the PA include the NRC, the South Dakota State Historic Preservation Officer, the Advisory Council on Historic Preservation, the U.S. Bureau of Land Management (BLM), the U.S. Environmental Protection Agency (EPA), and Powertech. BLM and EPA designated the NRC as the lead agency for Section 106 compliance pursuant to 36 CFR 800.2(a)(2). While **the 2014 PA has expired**, it had not been implemented.

March 14, 2025 Letter from NRC Staff to Petitioner NDN Collective at 2 (emphasis added) (attached as Attachment 36), at 2. *See also* January 24, 2025 letter from NRC Staff to Oglala Sioux Tribe at 1 (“As part of the NRC’s licensing review, the NRC staff is initiating its Section 106 consultation under the National Historic Preservation Act of 1966, as amended (NHPA) and its implementing regulations at Title 36 of the *Code of Federal Regulations* (36 CFR) Part 800, ‘Protection of Historic Properties.’”) (attached as Attachment 37).

The ASLB recently affirmed that NHPA Section 106 consultation must be reinitiated for purposes of NRC’s compliance with NHPA.

Organizational Petitioners claim a violation of the NHPA’s consultation requirement. But such a contention is not ripe at this point in the proceeding. The Commission has held, repeatedly and expressly, that claims of a violation of the consultation requirement under the NHPA may be interposed only after the Staff has issued its draft environmental review document. “The agency granting the license, here the NRC, has the obligation to comply with the NHPA.”

January 31, 2025 Memorandum and Order (Granting, in Part, Organizational Petitioners’ Request for Hearing and Denying Henderson’s Request for Hearing) (“Jan. 31, 2025 ASLB Order”) at 20 (attached as Attachment 38).

As part of the briefing in the NRC license renewal proceeding before the ASLB, NRC Staff explained that its compliance with the NHPA with respect to the Dewey-Burdock project is not satisfied, and is ongoing:

At this early stage of the LRA review, the Staff is still preparing to initiate the consultation required under the NHPA. As part of its responsibilities under the NHPA, **the NRC must consult before the issuance of the subject renewed license** with any Indian tribes that “attach[] religious and cultural significance to historic properties that may be affected” by the issuance of the renewal license. In general, the NRC implements its responsibilities under the NHPA in conjunction with the NEPA process, which is also in its early stages. Thus, the **NRC is not required to consult with the Tribe at this stage of its review but will do so in accordance with its processes for complying with NEPA and the NHPA.**

November 4, 2024 NRC Staff Consolidated Answer to Intervention Petition of Susan Henderson and Intervention Petition of the Oglala Sioux Tribe, Black Hills Clean Water Alliance, and NDN Collective (“Nov. 4, 2024 NRC Staff Answer”) at 25 (emphasis added)(attached as Attachment 39).

In granting Petitioners here a right to litigate its live claims before the ASLB as part of the NRC license renewal process, the ASLB issued the following Order granting Petitioners’ Contentions:

C. Conclude that Contention 1 of the Organizational Petitioners (the Oglala Sioux Tribe, the Black Hills Clean Water Alliance, and the NDN Collective) is admitted as two reformulated contentions:

Organizational Petitioners’ Contention 1A: Powertech’s Combined Technical Report and Environmental Report fails to comply with the NRC’s regulations in that it contains an inadequate, inaccurate, or incomplete description of the cultural and historical resources as to the Oglala Sioux Tribe in the Dewey-Burdock Project area.

Organizational Petitioners’ Contention 1B: Powertech’s Combined Technical Report and Environmental Report fails to explain its conclusion that the impacts of the Dewey-Burdock Project on cultural and historic resources will be “none.”

D. Conclude that Contention 2 of the Organizational Petitioners is admitted as reformulated:

Powertech's License Renewal Application fails to account for, address, or analyze the cumulative effects of Powertech's uranium recovery in the Gas Hills and Dewey Terrace project areas as reasonably foreseeable effects of construction and operation of the Dewey-Burdock Project;

Jan. 31, 2025 ASLB Order at 62. The live question as to the inadequate, inaccurate, and incomplete identification of, and analysis of impacts to, cultural resources at the proposed Dewey-Burdock site confirm that NHPA compliance is also incomplete, as Section 106 requires the agency to "make a reasonable and good faith effort to carry out appropriate identification efforts." 36 C.F.R. § 800.4(b)(1).

By following NRC's lead instead of meeting EPA's NHPA obligations directly, EPA Region 8 is out of compliance. As this Board has recognized, "if the lead agency is in non-compliance with Section 106, so is the agency that designated it as lead." Nov. 16, 2023 EAB Ruling at 23 (citing Advisory Council on Historic Preservation, Frequently Asked Questions About Lead Federal Agencies in Section 106 Review, <https://www.achp.gov/digital-library-section-106-landing/frequently-asked-questions-about-leadfederal-agencies>). The expiration of the PA and the subsequent reissuance of the UIC permits triggers a requirement for EPA Region 8 to comply with the requirements of Section 106 of the NHPA. "An approved programmatic agreement satisfies an agency's Section 106 responsibilities '**until it expires** or is terminated by the agency ... or [ACHP].' [36 C.F.R.] § 800.14(b)(2)(iii)." *Narragansett Indian Tribe by & through Narragansett Indian Tribal Historic Pres. Off. v. Pollack*, No. CV 22-2299 (RC), 2023 WL 4824733, at *2 (D.D.C. July 27, 2023) (emphasis added).

EPA Region 8 has failed to meet its ongoing NHPA duties, which include consultation, on its reissuance of the UIC permits for the Dewey-Burdock Project. This reissuance of permits is an "undertaking" under the NHPA, requiring compliance with Section 106. The NHPA defines an "undertaking" as a project, activity, or program funded in whole or in part under the direct or

indirect jurisdiction of a Federal agency, including those requiring a federal permit, license, or approval. *National Trust for Historic Preservation v. Blanck*, 938 F. Supp. 908, 919 (D.D.C. 1996). This definition includes not only new projects but also continuing projects and activities. *Id.*

The NHPA requires federal agencies to take into account the effects of their undertakings on historic properties and to provide the Advisory Council on Historic Preservation a reasonable opportunity to comment on such undertakings. *Morris County Trust for Historic Preservation v. Pierce*, 714 F.2d 271 (1983). This obligation applies to any federal action that has the potential to cause effects on historic properties, including the issuance of permits. 36 C.F.R. § 800.3.

Section 106 requirements also apply to permits, such as those here, reissued after remand. In *Vieux Carre Property Owners, Residents and Associates, Inc. v. Brown*, the federal Court of Appeals for the 5th Circuit held that NHPA review applies to ongoing federal actions as long as the project is “under federal license and the [agency] has the ability to require changes that could conceivably mitigate any adverse impact the project might have on historic preservation goals” *Vieux Carre Prop. Owners, Residents & Assocs., Inc. v. Brown*, 948 F.2d 1436, 1445 (5th Cir. 1991). Thus, whether original or reissued permits, as part of ongoing federal actions, these undertakings require Section 106 compliance. This is especially true here, where EPA Region 8 has the ability to require competent cultural resource surveys, which have never been conducted on the site and which the Tribe and Petitioners request. *See also Morris Cnty. Tr. for Historic Pres. v. Pierce*, 714 F.2d 271, 280 (3d Cir. 1983) (NHPA applies “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.”).

Notably, in this case, there is no lawful basis for the agency to rely on a Programmatic Agreement (PA) to satisfy its NHPA Section 106 responsibilities. Binding regulations restrict the use of a PA to only those circumstances:

- (i) When effects on historic properties are similar and repetitive or are multi-State or regional in scope;
- (ii) When effects on historic properties cannot be fully determined prior to approval of an undertaking;
- (iii) When nonfederal parties are delegated major decisionmaking responsibilities;
- (iv) Where routine management activities are undertaken at Federal installations, facilities, or other land-management units; or
- (v) Where other circumstances warrant a departure from the normal section 106 process.

36 C.F.R. § 800.14(b)(1). EPA Region 8 has not provided any demonstration or provided a competent administrative record for a determination that any of these categories apply to the proposed Dewey-Burdock project. This is a mine site confined to a distinct geographic boundary, with well-defined features and ground disturbing activities. A competent cultural resources survey of the site would provide for the necessary identification and evaluation of, determination of the effects to, and mitigation necessary for, the cultural resources at the site. Thus, any remand order should confirm that the proposed Dewey-Burdock site is ineligible under the applicable regulations for coverage under a PA to ensure EPA Region 8 performs its consultation duties under the NHPA.

EPA Region 8 Failed to Comply with its Cumulative Effect Review Requirements

EPA regulations require that the agency must evaluate “[t]he cumulative effects of drilling and operation of additional injection wells....” 40 C.F.R. § 144.33(c)(3). This Board specifically authorized Petitioners to preserve its arguments regarding the failure of EPA Region 8 to comply with its legal obligations to review the cumulative impacts from the proposed Dewey-Burdock project. Sept. 3, 2024 EAB Order, at 46 n. 23. Petitioners hereby expressly re-

assert and incorporate by reference the arguments presented in the Oglala Sioux Tribe's December 24, 2020 Petition for Review, at 25-31.

In addition, as discussed herein, the NRC's ASLB has recently admitted additional arguments related to the cumulative impacts at the site – most notably those arising from the Applicant's well-articulated plans to convert the proposed Dewey-Burdock into a regional uranium processing facility for a series of satellite mines in the region.

In this case, the EPA's cumulative impacts analysis fails to discuss the Applicant's expanded scope of the Project area, additional processing proposals, and the current site configuration, and therefore requires additional analysis. For instance, the Applicant has released documents that demonstrate planned expansions of the disturbed area from the project in the form of entire additional wellfields. *See* Map included in the applicant's November 2018 press release (attached as Attachment 14) compared to the map from the 2014 NRC Final Supplemental Environmental Impact Statement (attached as Attachment 15). The Applicant's December 4, 2019 press release announced an increase in the amount of uranium ore it proposes mine from the property. *See* Azarga/Powertech December 4, 2019 press release (attached as Attachment 16). These significant increases are not addressed in the EPA's cumulative impact analysis documents. Further, storage issues, including radon emissions are not addressed, but rather left for in the Clean Air Act, NESHAP Subpart W permit, with no plan for permanent disposal of the radioactive solids.

The Applicant has also announced concrete plans to use the Dewey-Burdock site as a regional processing facility for other mine sites. The EPA's cumulative impact review document includes no information on these impacts. Further, formal securities filings from the Applicant confirm three additional major changes that impact NRC renewal licensing. NI 43-101 Technical

Report Preliminary Economic Assessment Dewey-Burdock Uranium ISR Project South Dakota, USA (December 2020 PEA)(attached as Attachment 40); NI 43-101 Technical Report Preliminary Economic Assessment Gas Hills Uranium Project Fremont and Natrona Counties, Wyoming, USA (August 2021 PEA) (attached as Attachment 41); NI 43-101 Technical Report Mineral Resource Report Gas Hills Uranium Project Fremont and Natrona Counties, Wyoming, USA (May 2021 PEA) (attached as Attachment 42). The company has filed additional formal documents, including a Management's Discussion and Analysis (MDA) submitted to the U.S. Securities and Exchange Commission on November 14, 2024, which confirms that the company is moving forward with the Gas Hills Uranium Project:

The Company has commenced the initial permitting work to advance the Gas Hills Uranium Project (Gas Hills) as an ISR uranium recovery operation located in central Wyoming, approximately 60 miles west of Casper, WY. As part of the initial data collection for project permitting, **the Company initiated core drilling during the three months ended September 30, 2024.** Gas Hills has a current resource and robust economics as described in a 2021 PEA. It is ideally located in the historic Gas Hills Uranium Mining District, a brownfield area of extensive previous mining. The Company has Dewey-Burdock and Gas Hills as its mid-term production assets within the planned production pipeline.

Page 4 (emphasis added) (attached hereto as Attachment 43). The same document (at p. 3) states that "During the three months ended September 30, 2024, the Company conducted resource development drilling on its Dewey Terrace project area. The Dewey Terrace project is located across the Wyoming-South Dakota border from western extent of the Dewey Burdock ISR Uranium Project." Notably, this MDA was certified as accurate and complete by the applicant's Chief Executive Officer

(sec.gov/Archives/edgar/data/1500881/000121390024097787/ea022055201ex99-3_encore.htm).

These documents from the applicant, independently and combined with the recent certified statements from the applicant's leadership, constitute material and sufficiently material

new information confirming that the satellite mine projects are in process. The findings of the NRC's ASLB confirm that these additional mining developments are reasonably foreseeable. Attachment 38 at 43-50.

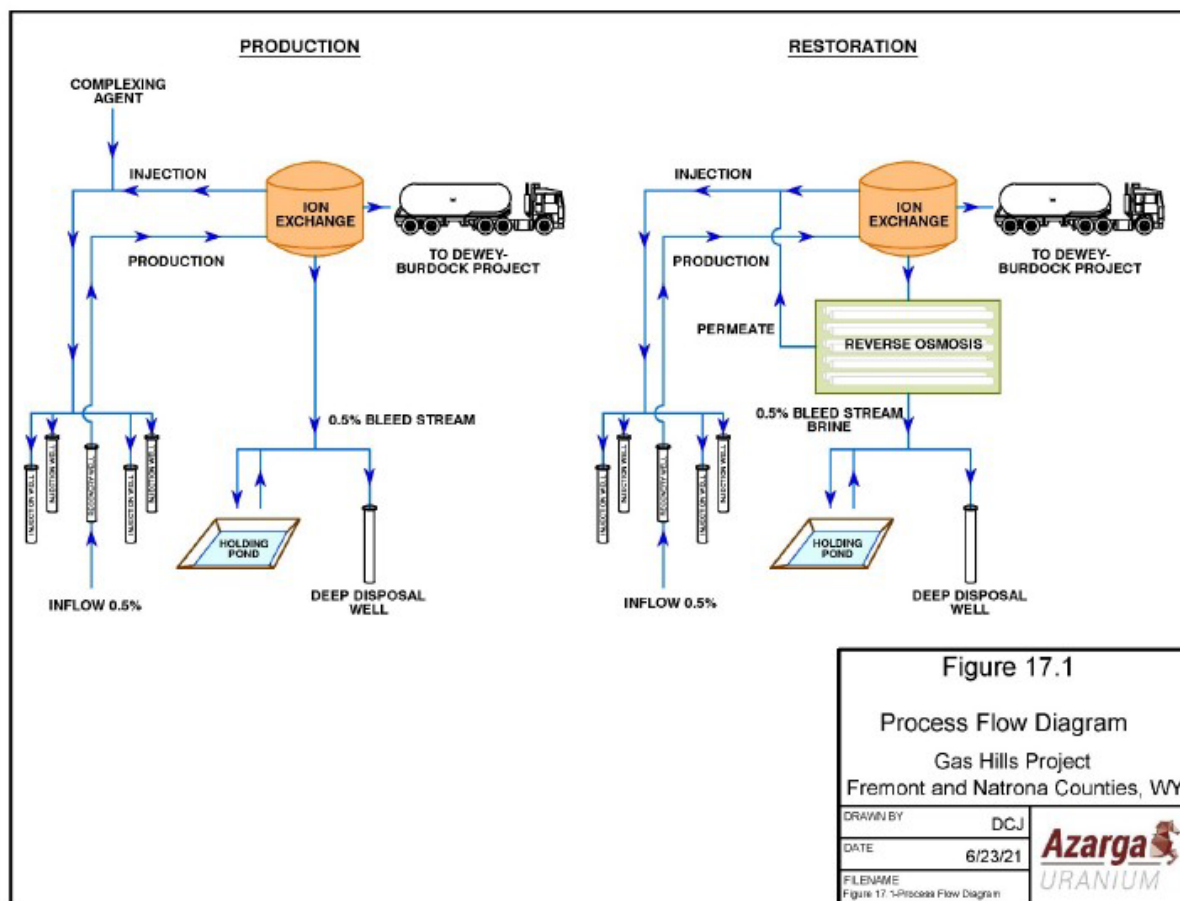
The significant changes proposed through these documents demonstrate the inadequacies of the existing cumulative impacts analysis of the construction and operation of the proposed mine at issue in this case. For instance, the December 2020 PEA recognizes that the "project permit area" is 10,580 acres, the PEA addresses "approximately 16,962 acres of mineral rights in the project area" that are controlled by Powertech. December 2020 PEA at 19. The expanded well field areas, and accompanying infrastructure, are wholly neglected in the EPA's cumulative impact review.

In 2021, the permit applicant confirmed that the volume and character of the waste streams changed. The Applicant's plans now include waste and residues from uranium processing involving wells slated to use acid leach, which will be initially processed at one or more of Powertech's "satellite operations" and then shipped to Dewey-Burdock for the remaining three "major solution circuits."

ISR operations consist of four major solution circuits, ion exchange to extract uranium from the mining solution, an elution circuit to remove uranium from the IX resin, a yellowcake precipitation circuit, and a dewatering, drying, and packaging circuit. Because the Project will be a satellite facility to Azarga's Dewey-Burdock Project, only the first major solution circuit (the IX circuit) will be located at the Project. Loaded resin will be transported to the Dewey-Burdock Project, where the uranium will be eluted, precipitated, dried, and packaged.

August 2021 PEA at 82. The regulatory filing includes a diagram of the relationship between one of the satellite facilities and the Dewey-Burdock Project:

Figure 17.1. Process Flow Diagram



EPA Region 8’s cumulative impacts review does not address the announced plans to use Dewey- Burdock as a central processing facility for Gas Hills and other ISL uranium projects. EPA Region 8 must analyze this, and any other satellite facilities, as part of its cumulative effects review, as that document no longer reflects current plans of the Applicant to use the Dewey-Burdock site as a central processing and disposal facility across a number of additional project areas, many of which are likely to impact groundwater, cultural resources, and other resources.

Importantly for these issues raised herein, EPA Region 8 has refused to allow for any additional public comment period on the reissued permits. This is despite the fact that the last public comment period on the permits expired in December of 2019 – almost five and half years

ago. The applicable regulations require only that Petitioners “must raise **all reasonably ascertainable issues** and submit **all reasonably available arguments** supporting their position by the close of the public comment period (including any public hearing) under § 124.10.” 40 C.F.R. § 124.13. Given that the documents referred to and cited herein, and attached hereto, have come into existence in the intervening five and half years, there was no reasonable opportunity for Petitioners to raise them. This should be reason alone for this Board to remand the permits to allow for the public to raise all relevant issues so that EPA Region 8 can respond to them in the first instance. Unfortunately, “Region 8 has decided not to exercise its discretion to reopen the Permits for additional public notice and comment.” Response to Comments #185.

CONCLUSION

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

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STATEMENT REQUESTING ORAL ARGUMENT

Petitioner Oglala Sioux Tribe requests that the Environmental Appeals Board hold oral argument in this matter. The issues involved are complex and are based on a voluminous administrative record that reaches back over eighteen (18) years.

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 9,206 words in length.

LIST OF ATTACHMENTS

Complete versions are being provided electronically to the EAB Clerk's office.

Attached are the following exhibits, numbered in order of appearance in the petition:

- | | |
|----------------|---|
| Attachment #1: | Comments submitted by Petitioner Oglala Sioux Tribe to EPA on June 19, 2017 (with attachments) |
| Attachment #2: | Comments submitted by Petitioner Oglala Sioux Tribe to EPA on December 9, 2019 (with attachments) |
| Attachment #3: | Oglala Sioux Tribe Ordinance #11-10 |
| Attachment #4: | September 11, 2020 email thread between EPA and the Oglala Sioux Tribe |
| Attachment #5: | September 18, 2020 letter from EPA to the Oglala Sioux Tribe |

Attachment #6: Proposed October 2, 2020 agenda

Attachment #7: September 28, 2020 email from the Oglala Sioux Tribe to EPA-BLM

Attachment #8: September 29, 2020 email from the Oglala Sioux Tribe to EPA-BLM

Attachment #9: October 14, 2020 email from the Oglala Sioux Tribe to EPA-BLM

Attachment #10: October 21, 2020 letter from EPA to the Oglala Sioux Tribe

Attachment #11: November 2, 2020 letter from Oglala Sioux Tribe President to EPA

Attachment #12: November 19, 2020 letter from EPA Region 8 to the Oglala Sioux Tribe

Attachment #13: Final Programmatic Agreement

Attachment #14: Map included in the applicant's November 2018 press release

Attachment #15: Map from the 2014 NRC Final Supplemental Environmental Impact Statement

Attachment #16: Azarga/Powertech December 4, 2019 press release

Attachment #17: Powertech October 31, 2017 press release

Attachment #18: Dewey-Burdock Project Application for NRC Uranium Recovery License Fall River and Custer Counties South Dakota Technical Report (excerpt) page 1-8

Attachment #19: Powertech (USA) Inc. Dewey-Burdock Project Class III Underground Injection Control Permit Application page 10-14

Attachment #20: Dewey-Burdock Project Application for NRC Uranium Recovery License Fall River and Custer Counties, South Dakota, Environmental Report, February 2009 (excerpt) page 1-25

Attachment #21: State of South Dakota approval in Case No. 5-2019

Attachment #22: Rebuttal Testimony of Dr. Robert Moran

Attachment #23: August 20, 2014 Hearing Transcript

Attachment #24: Declaration of Dr. Richard Abitz

Attachment #25: Opening Testimony of Dr. Robert Moran

Attachment #26:	Post-Hearing Testimony of Dr. Hannan LaGarry
Attachment #27:	April 28, 2010 letter from EPA to Powertech (USA) Inc. Dewey-Burdock Class V Area Permit Administrative Review Determination
Attachment #28:	Powertech (USA) Inc. Class III UIC Area Permit Application cover page
Attachment #29:	FY08 OPRA ISL Uranium activities – VS2 Oct28-08
Attachment #30:	AOR ZOI Definitions v3 6 20 2008
Attachment #31:	EPA FOIA release cover letter
Attachment #32:	Powertech-EPA rulemaking on definitions
Attachment #33:	Powertech Dewey Burdock emails
Attachment #34:	Powertech-EPA rulemaking emails
Attachment #35:	EPA Response to Comments
Attachment #36	March 14, 2025 Letter from NRC Staff to Petitioner NDN Collective
Attachment #37	January 24, 2025 letter from NRC Staff to Oglala Sioux Tribe
Attachment #38	January 31, 2025 Memorandum and Order (Granting, in Part, Organizational Petitioners’ Request for Hearing and Denying Henderson’s Request for Hearing)
Attachment #39	November 4, 2024 NRC Staff Consolidated Answer to Intervention Petition of Susan Henderson and Intervention Petition of the Oglala Sioux Tribe, Black Hills Clean Water Alliance, and NDN Collective
Attachment #40	NI 43-101 Technical Report Preliminary Economic Assessment Dewey-Burdock Uranium ISR Project South Dakota, USA (December 2020 PEA)
Attachment #41	NI 43-101 Technical Report Preliminary Economic Assessment Gas Hills Uranium Project Fremont and Natrona Counties, Wyoming, USA (August 2021 PEA)
Attachment #42	NI 43-101 Technical Report Mineral Resource Report Gas Hills Uranium Project Fremont and Natrona Counties, Wyoming, USA (May 2021 PEA)
Attachment #43	Management’s Discussion and Analysis (MDA) submitted to the U.S. Securities and Exchange Commission on November 14, 2024

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for Review in the matter of Powertech (USA) Inc., Dewey-Burdock Uranium In-Situ Recovery Project, Permit No.: Class III Area Permit No. SD31231-00000, And Class V Area Permit No. SD52173-00000, was served, by email in accordance with the Environmental Appeals Board's September 21, 2020 Revised Order Authorizing Electronic Service of Documents in Permit and Enforcement Appeals, on the following persons, this 11th Day of April, 2025:

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