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

In re: Powertech (USA) Inc. Permit No. SD31231-0000 and SD52173-0000	UIC Appeal No. 20-01

EPA REGION 8'S RESPONSE TO PETITION FOR REVIEW

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

FEDERAL CASES

EAB CASES

STATUTES

REGULATIONS

FEDERAL REGISTER

EXECUTIVE ORDERS

TABLE OF ATTACHMENTS

Attachment	Administrative Record Document Number	Description
A	868	Comments from the Oglala Sioux Tribe, 2019 public comment period
B	001	Response to Public Comments
C	263	Memorandum to the Dewey-Burdock UIC File: NEPA Functional Equivalence of UIC Permitting and Aquifer Exemptions under the SDWA for the Dewey Burdock Project
D	504	Final Environmental Justice Analysis
E	367	Cumulative Effects Analysis
F	482, 483, 484	USFWS concurrence letter; letter to U.S. Fish and Wildlife Service requesting concurrence; Biological Assessment
G	521	Executive Order 12898, Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations
H	528	Regional Implementation Plan to Promote Meaningful Engagement of Overburdened Communities in Permitting Activities
I	541	Plan EJ 2014
J	441	Supplemental Environmental Impact Statement for the Dewey-Burdock Project Vol. 1, Ch 1 - 5
K	444	Supplemental Environmental Impact Statement for the Dewey-Burdock Project Vol. 1 Ch 6 - 11 and Appendices
L	391	SD DENR 2013 Proposed Large Scale Mine Permit Recommendation and Additional Conditions
M	181	Davis & Curtis, 2007, Consideration of Geochemical Issues in Groundwater Restoration at Uranium In-Situ Leach Mining Facilities, NUREG-CR-6870
N	208	Johnson et al, 2016, Prediction of Uranium Transport in an Aquifer at a Proposed Uranium In Situ Recovery Site: Geochemical Modeling as a Decision-Making Tool, Chapter 4 in Management of Hazardous Wastes
O	260, 261	UIC Class III Permit Application Appendix N, Groundwater Quality Summary Tables; Appendix O, Groundwater Quality Analytical Data
P	109	Final Class III Area Permit, No. SD31231-00000
Q	281	Final Class V Area Permit, No. SD52173-00000
R	017, 018	Boggs, 1983, TVA Dewey Aquifer Pump Test Report; Boggs and Jenkins, 1980, TVA Burdock Aquifer Pump Test Report

Attachment	Administrative Record Document Number	Description
S	148, 149	Johnson, 2012, Using groundwater and solid-phase geochemistry for reactive transport modeling at the proposed Dewey Burdock uranium in situ recovery site, Edgemont, South Dakota, Final Regional Applied Research Effort Presentation to EPA; Johnson, 2012, Geochemical Data from Groundwater at the Proposed Dewey Burdock Uranium In-Situ Recovery Mine, Edgemont, South Dakota, USGS OF12-1070
T	238	Powertech, 2013, UIC Class III Permit Application Permit Application, 7520-6 Form and Report
U	249	UIC Class III Permit Application Appendix C, Exploration Drill Holes within One-Mile Perimeter around the Dewey-Burdock Project
V	171	Fact Sheet for the second Dewey-Burdock Draft Class III Area Permit, August 26, 2019
W	045	Executive Order 13175 Consultation and Coordination With Indian Tribal Governments
X	043	EPA, 2011, Policy on Consultation and Coordination with Indian Tribes
Y	963	EPA Region 8 Policy for Environmental Protection in Indian Country
Z	692-730	EPA consultation invitation letters inviting consultation on EPA's proposed UIC actions for the Dewey-Burdock uranium recovery project.
AA	914-919	Tribal consultation meeting notes
BB	854-856	Tribal consultation with Oglala Sioux Tribe documents
CC	860	EPA Talking Points for Community Outreach Plan Discussion with the Oglala Sioux Tribe during the June 17, 2016 meeting
DD	857-858	June 30, 2016 letters to OST Tribal Council members requesting meetings
EE	859	Trip report prepared by EPA documenting EPA's meeting with the Oglala Sioux Tribe Land and Natural Resources Committee
FF	734-738	June 2017 letters to several Tribes inviting consultation
GG	864	Letter dated June 19, 2017 from Oglala Sioux Tribe President Weston to EPA Administrator Scott Pruitt
HH	920	EPA notes from consultation meeting with representatives from the Ponca Tribe of Nebraska

Attachment	Administrative Record Document Number	Description
II	739-776	July 8, 2019 letters from EPA inviting consultation with Tribes
JJ	921-923	EPA notes from consultation meetings
KK	866	August 2, 2018 letter from Oglala Sioux Tribe President Bear Runner replying to EPA's July 8, 2019 consultation invitation letter
LL	887-888	Emails between EPA and Oglala Sioux Tribe discussing the scheduling and logistics of consultation meetings
MM	868-869	Comments from the Oglala Sioux Tribe, 2019 public comment period
NN	777-792, 851	February 2020 letters to Tribes informing them of deadline to schedule another consultation meeting
OO	874	EPA letter dated June 23, 2020, replying to Oglala Sioux Tribe President Bear Runner's June 17, 2020 letter stating EPA cannot travel due to COVID-19 restrictions and proposing a call
PP	924	EPA notes from consultation web conference with representatives from the Santee Sioux Tribe
QQ	875	Email from EPA Senior Tribal Advisor to the Regional Administrator, Jennifer Spotted Bear, Oglala Sioux Tribe President with the EPA/Oglala Sioux Consultation Schedule/Plan for the Dewey-Burdock Project
RR	877	EPA's meeting notes from the August 28, 2020 consultation meeting with the Oglala Sioux Tribe
SS	878	EPA letter dated September 18, 2020, replying to Oglala Sioux Tribe President Bear Runner's August 21, 2020 meeting agreeing to attend the joint consultation meeting schedule with the Tribe and BLM
TT	879	EPA letter dated October 21, 2020, to President Bear Runner after the Tribe did not hold the October 2nd meeting informing him of the Conclusion of Tribal Consultation
UU	885	EPA letter dated November 24, 2020, notifying Oglala Sioux Tribe President Bear Runner of the closure of EPA's consultation process

INTRODUCTION

The U.S. Environmental Protection Agency ("EPA") Region 8 hereby responds to the Petition for Review ("Petition") submitted by the Oglala Sioux Tribe (hereinafter referred to as "Petitioner" or "Tribe"), and to the amicus brief filed by the Great Plains Tribal Water Alliance, Inc. ("Alliance"). On November 24, 2020, the Region issued a Class III Underground Injection Control ("UIC") Area Permit (Permit No. SD31231-0000) and Class V UIC Area Permit (Permit No. SD52173-0000) to Powertech (USA) Inc. ("Powertech") for an in-situ uranium facility. These Permits were issued under the UIC Program of the Safe Drinking Water Act ("SDWA"), 42 U.S.C. § 300h *et seq*. The Tribe filed the Petition on December 24, 2020, pursuant to 40 C.F.R. § 124.19, seeking review of the Permits. The Alliance filed an amicus brief on January 14, 2021.

For the reasons set forth below, EPA respectfully requests that the Environmental Appeals Board ("EAB" or "Board") deny review of the Petition and the issues raised in the amicus brief, because they do not meet threshold procedural requirements for Board review and do not demonstrate that Region 8's permit decisions were clearly erroneous or otherwise warrant review.

STATUTORY AND REGULATORY BACKGROUND

Congress enacted the SDWA in 1974 to ensure that the nation's sources of drinking water are protected against contamination and "to prevent underground injection which endangers drinking water sources." 42 U.S.C. § 300h(b). The SDWA directs EPA to promulgate regulations containing minimum requirements for state programs to protect underground sources of drinking water ("USDWs"). 42 U.S.C. § 300h. The UIC program regulations cover the construction, operation, permitting, and closure of injection wells used to place fluids underground. 40 C.F.R. parts 144-148. In states without an approved UIC program, EPA directly implements the UIC

regulations and issues permits. 40 C.F.R. § 144.1(e). Because the State of South Dakota has not received approval to implement the UIC Program for Class III or V wells, EPA Region 8 is the permitting authority in South Dakota. *See* 40 C.F.R. § 144.1(e); 40 C.F.R. §§ 147.1(a-b), 147.2101. There are also procedural regulations for the UIC program at 40 C.F.R. part 124.

The SDWA requires a person to obtain a permit to operate an underground injection well unless the well is authorized by rule. 42 U.S.C. § 300h-3(b), 40 C.F.R. § 144.11. Central to the permitting requirements in the UIC regulations is a stringent non-endangerment standard for UIC permits. These regulations prohibit injection activities that allow the movement of fluid containing contaminants into a USDW if the presence of the contaminant may cause a violation of drinking water standards or otherwise adversely affect human health. 40 C.F.R. §§ 144.1(g), 144.12. The regulations define six classes of wells. Class III wells are defined as injection wells for the extraction of minerals including "[i]n situ production of uranium or other metals." 40 C.F.R. § 144.6(c)(2). Class V wells are defined as wells that are not included in any other class. 40 C.F.R. § 144.6(e). UIC regulations also allow EPA to exempt an aquifer or a portion of an aquifer when certain criteria are met and to permit activities such as in-situ mining in exempt aquifers, where it can be done in a manner that is protective of USDWs outside of the exempt portion of the aquifer. 40 C.F.R. § 146.4. Once EPA approves an aquifer exemption, the exempt portion is no longer considered a USDW as defined in 40 C.F.R. § 144.3, and it is not protected as a USDW under UIC regulations. The EPA consolidated permitting regulations at 40 C.F.R. § 124.9(b)(6) specifically exempt certain EPA permitting actions, including the issuance of UIC permits, from the National Environmental Policy Act (NEPA).

FACTUAL AND PROCEDURAL BACKGROUND

Powertech submitted a final Class III area permit application to EPA Region 8 in January 2013 and a final Class V area permit application in January 2012 for the purpose of operating an

in-situ recovery (ISR) of uranium facility. Powertech also submitted a request for an aquifer exemption of the mining portion of the Inyan Kara aquifers to allow injection into the Class III wells. The project site is in the southern Black Hills in South Dakota on the South Dakota-Wyoming state line in southwest Custer and northwest Fall River Counties, approximately 13 miles northwest of Edgemont, South Dakota, and 46 miles west of the western border of the Pine Ridge Indian Reservation.

The project will involve the injection of lixiviant, consisting of groundwater from the injection zone with added oxygen and carbon dioxide, into the uranium ore deposits within the Inyan Kara Formation targeted by 14 wellfields. These wellfields will consist of an approximate total of 1,500 Class III injection wells. Class III injection wells will be used to inject the lixiviant into the uranium ore zones. The lixiviant will mobilize uranium from the ore deposits and allow production wells to pump the uranium-bearing lixiviant out of the ground to a processing unit where the uranium will be removed from the solution using an ion exchange resin. The barren lixiviant will be pumped from the processing unit back to the ISR wellfield, where oxygen and carbon dioxide will be added before injection back into uranium ore deposits through the Class III wells.

The Class V permit authorizes the construction and operation of up to four deep Class V disposal wells within the Class V Area Permit Boundary. The purpose of these wells is to inject waste fluids from the Dewey Burdock project ISR process into the Minnelusa aquifer.

EPA Region 8 first issued draft permit decisions and a proposed aquifer exemption decision on March 6, 2017. Originally, the public comment period was scheduled to end on May 19, 2017, but after several requests for extension of the comment period, EPA Region 8 extended it until June 19, 2017. The Region received a large number of comments. Following review of

the comments, Region 8 made several changes to the Class III and V permits and aquifer exemption proposal. Given the high level of public interest and the number of changes made to the draft permits and proposed aquifer exemption, the Region issued new draft permits and a new proposed aquifer exemption for public comment on August 26, 2019. The public comment period was scheduled to conclude on October 10, 2019, but EPA Region 8 again extended it until December 11, 2019, due to public request. Following review of the public comments and information submitted, the Region issued final permit decisions on November 24, 2020.

STANDARD OF REVIEW

The standard of review for appeal of EPA-issued UIC permits is governed by 40 C.F.R. § 124.19. This regulation specifies threshold requirements that a petition for appeal must meet to obtain review. In any appeal from a permit decision issued under 40 C.F.R. part 124, the petitioner bears the burden of demonstrating that review is warranted. 40 C.F.R. § 124.19(a)(4). "A petition for review must identify the contested permit condition or other specific challenge to the permit decision and clearly set forth, with legal and factual support, petitioner's contentions for why the permit decision should be reviewed." 40 C.F.R. § 124.19(a)(4)(i); *In re Jordan Dev. Co., LLC*, 18 E.A.D. 1, 4 (EAB 2019), citing *In re Archer Daniels Midland Co.*, 17 E.A.D. 380, 382-83 (EAB 2017).

The Board will usually deny review of a permit decision unless the Petitioner demonstrates that a permit decision is based on a clearly erroneous finding of fact or conclusion of law. 40 C.F.R. § 124.19(a)(4)(i). *In re Jordan Dev. Co.,* 18 E.A.D. at 4; *In re Florence Copper, Inc.*, slip op. at 3, 17 E.A.D. 406, 409 (EAB 2017). To meet this standard, a petition must meet a minimum level of specificity. *See Guide to the U.S. Environmental Protection Agency's Environmental Appeals Board* (March 2023) at 14 ("The petition for review should identify the specific aspects of the permitting decision being challenged."); 40 C.F.R.

§ 124.19(a)(4)(i). It is not enough for a petitioner to rely on previous statements of its objections during the administrative process, such as comments on a draft permit; it must demonstrate why the permit issuer's response to those objections is clearly erroneous or otherwise warrants review. *See* 40 C.F.R. § 124.19(a)(4)(ii). "If the petition raises an issue that the Regional Administrator addressed in the response to comments document issued pursuant to § 124.17, then petitioner must provide a citation to the relevant comment and explain why the… response was clearly erroneous or otherwise warrants review;" 40 C.F.R. § 124.19(a)(4)(ii); *see, e.g., In re Westborough*, 10 E.A.D. 297, 305, 311-312 (EAB 2002); *In re Penneco Envtl. Solutions, LLC,* 17 E.A.D. 604, 609 (EAB 2018)*; In re Beeland Grp., LLC*, 14 E.A.D. 189, 196 (EAB 2008); *see also In re Stonehaven Energy Mgmt., LLC*, 15 E.A.D. 817, 823 (EAB 2013) ("Consequently, the Board consistently has denied review of petitions that merely cite, attach, incorporate, or reiterate comments previously submitted on the draft permit." (citations omitted))*; In re Peabody W. Coal Co*., 12 E.A.D. 22, 33 (EAB 2005) ("[P]etitioner may not simply reiterate comments made during the public comment period, but must substantively confront the permit issuer's subsequent explanations.").

In seeking review of a permit based on fundamentally technical or scientific matters, the Board generally defers to the permit issuer, as long as the permit issuer adequately explains its rationale and supports its reasoning in the administrative record. *In re Muskegon Dev. Co.*, 18 E.A.D. 88, 90 (EAB 2020) (citing *In re Jordan Dev. Co*., 18 E.A.D. at 5).

ARGUMENTS

A. Issues Remaining for Review

In its recent order considering Petitioner's request to amend its Petition, the Board resolved some of the arguments raised by Petitioner and listed the issues remaining for Board resolution. *See* 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) ("Order Denying Motion to Amend"). The remaining issues identified by the Board are "the reference in the petition to NHPA section 110, *see* Pet. at 22; the NEPA claim, Pet. at 23-33; the SDWA claim, Pet. at 34-45; and the Administrative Procedure Act claim, Pet. at 45-52." *Id.* at 29-30. Additionally, in another recent order, the Board directed the parties to address in their response and reply briefs the issues raised in Powertech's motion to strike the Alliance's amicus brief. *See* Order Scheduling Briefing and Oral Argument (Nov. 16, 2023).

B. National Historic Preservation Act Section 110

Only one issue related to the NHPA remains for the Board's consideration: the reference in the Petition to section 110.[1] The Board should now deny review on section 110, for three reasons. First, the issue was not adequately raised in public comments. Second, the claim was not raised in the Petition with sufficient specificity or clarity. And third, given the nature of section 110 and the nature of the challenged action here, no comment or petition argument *could* raise a colorable challenge based on that provision.

1. Review should be denied on NHPA section 110 because no one sufficiently raised the issue during the public comment period.

As a threshold matter, the Board should deny review as to NHPA section 110 because it was not adequately raised as an issue in comments on the proposed UIC permits. The Region is aware of only one mention of NHPA section 110 in the comments:

---

[1] Petitioner's primary argument as to the National Historic Preservation Act (NHPA) concerned the Region's compliance with section 106 of that statute. The Board has now decided that issue in the Region's favor, denying review on the NHPA section 106 issue raised in the petition. Order Denying Motion to Amend at 2, 20-29.

Congress added section 110 to the NHPA in 1980. PL 96–515 (HR 5496), 94 Stat 2987 (Dec. 12, 1980). In the 2014 enactment of the NHPA into positive law, section 110 was codified at 54 U.S.C. sections 306101–306107 and 306109–306112. For simplicity, the Region will continue to refer to these provisions collectively as "section 110."

> In addition to the Section 106 NHPA duties, NHPA Section 110 imposes responsibilities on EPA to ensure a proper identification and evaluation of cultural resources. These duties cannot be dispensed with simply through attempts to contact the Tribe in the Section 106 consultation context.

Attachment A, Document 00868, Bates 090692. No other commenter mentioned NHPA section 110, and the brief reference in Petitioner's comment does not satisfy the obligation to "raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period." 40 C.F.R. § 124.13. It does not explain what "responsibilities" or "duties" are allegedly involved, or how the Region may have failed to comply with them. And, as demonstrated by the fact that the Tribe commented on the Region's NHPA section 106 compliance, Petitioner cannot argue that the statute was not reasonably ascertainable or available. Attachment A, Document 00868, Bates 090692. "The failure to raise an issue that was 'reasonably ascertainable' during the public comment period is grounds for denial of a petition for review." *In re Ocean Era, Inc.*, 18 E.A.D. 678, 697 (EAD 2022); *see also In re Indeck-Elwood, LLC*, 13 E.A.D. 126, 143 (EAB 2006). The Board should therefore decline to grant review with respect to NHPA section 110.

2. Review should be denied on NHPA section 110 because the Petition does not specifically identify the challenges and contentions as to that provision.

The Board should also deny review on NHPA section 110 because the Petitioner has failed to specifically identify its claim, and therefore failed on another threshold issue for review before the Board. "[A] petition for review must identify the … specific challenge to the permit decision and clearly set forth, with legal and factual support, petitioner's contentions for why the permit decision should be reviewed." 40 C.F.R. § 124.19(4)(i). Here, the Petition contains only a general statement concerning this provision, essentially identical to the vague and insufficient comment that it submitted on the proposed permit:

> In addition to Section 106 NHPA duties, NHPA Section 110 also ensures proper identification and evaluation of cultural resources. 16 U.S.C. § 470h–2. See Attachment 2 (Tribe's 2019 comments) at bates 0009. These duties extend beyond those imposed by the Section 106 consultation process and cannot be satisfied by mere outreach letters.

Pet. at 22. As with the comment described above, Petitioner does not identify any specific failure by the Region to comply with the unspecified duties that it asserts, and does not comply with its obligation to include "argument, with factual and legal support, as to why the permit condition or other challenge warrants review by the Board." *In Re Seneca Res Corp.*, 16 E.A.D. 411, 413 (EAD 2014). The vague statements about section 110 lack the specificity and clarity that is required for a permit challenge to succeed, and review should be denied. *See id.* at 414 (denying review because the petitioner's "generalized concerns" did not present a specific challenge).

3. Review should be denied because NHPA section 110 does not provide a separate basis for challenging the Region's actions.

Even if a comment from the public had preserved an argument concerning the Region's compliance with NHPA section 110, and even if the Petitioner had raised a specific challenge related to that compliance n the Petition, section 110 provides no ground for a challenge to the permits. "Section 110 *does not affirmatively mandate* the preservation of historic buildings or other resources" and only requires an agency "to comply to the fullest extent possible with, and in the spirit of, the Section 106 consultation process." *Oglala Sioux Tribe v. U.S. Army Corps of Eng'rs*, 537 F. Supp.2d 161, 173 (D.D.C. 2008) (emphasis in original; quoting *Nat'l Trust for Historic Pres. v. Blanck*, 938 F. Supp. 908, 925 (D.D.C. 1996)).

As the Board has already concluded, the Region has fully complied with NHPA section 106 and its implementing regulations. Section 110 adds no other applicable NHPA requirement for these permits and thus provides no additional basis for Board review. In addition, as explained above, the Petition's unexplained and cursory reference to NHPA section 110, and the

near-identical comment that preceded it, are insufficient to satisfy the requirements for Board review. The Board should therefore deny review on this issue.

C. National Environmental Policy Act

The Board should also deny review of Petitioner's claim that the Region violated the NEPA functional equivalence doctrine by not addressing detailed NEPA requirements. Petitioner obfuscates the requirements of functional equivalence by referring to NEPA requirements.

As an initial matter, however, Petitioner does not meet the Board's standard of review for appeal because Petitioner does not address the substance of EPA's response to comments regarding longstanding caselaw finding that the SDWA and the UIC permit program are the functional equivalent of NEPA. Petitioner does not identify how the Region's response to comments is clearly erroneous or otherwise warrants review. In addition, the Petition itself does not address the specific caselaw regarding SDWA and UIC permit program NEPA functional equivalence, which makes clear that following the SDWA requirements alone is sufficient as a matter of law. Further, Region 8 undertook an orderly environmental review and robust public participation process prior to issuing the UIC permits -- consistent with the functional equivalence doctrine and EPA's UIC permit regulations. The Board should deny review of Petitioner's NEPA functional equivalence claims.

1. Review should be denied because Petitioner did not address EPA's response to comments regarding longstanding caselaw finding that the SDWA and the UIC permit program are the functional equivalent of NEPA.

The Board should deny review regarding petitioner's NEPA functional equivalence claim because Petitioner does not address EPA's response to comments regarding longstanding caselaw finding that the SDWA and the UIC permit program are the functional equivalent of NEPA. As a result, Petitioner does not identify how the Region's response to comments was

clearly erroneous or otherwise warrants review. In addition, the Petition itself does not address the specific caselaw regarding SDWA and UIC permit program NEPA functional equivalence.[2]

Ordinarily federal agencies must prepare an Environmental Impact Statement (EIS) for, *inter alia*, "major Federal Actions significantly affecting the quality of the human environment…" NEPA § 102(C), 42 U.S.C. § 4332(C). However, courts have consistently and broadly exempted certain EPA actions from the procedural requirements of NEPA through the "functional equivalence" doctrine. *See* 72 Fed. Reg. 53652, 53654 (Sept. 19, 2007). The courts have reasoned that EPA actions under these statutes[3] are functionally equivalent to the review required under NEPA because they consider environmental impacts and provide an opportunity for public involvement. 72 Fed. Reg. at 53654. As discussed in the Region's Response to Public Comments (Attachment B, Document 001, Bates pp. 000316-000320), the U.S. Court of Appeals for the 8th Circuit found the SDWA is the functional equivalent of NEPA and therefore formal NEPA compliance is not required by EPA when EPA takes action pursuant to the SDWA. *Western Nebraska Res. Council v. U.S. EPA*, 943 F.2d 867 (8th Cir. 1991). In doing so, the court agreed with "the many circuits that have held that EPA does not need to comply with the formal requirements of NEPA in performing its environmental protection functions under 'organic

[2] While the Petition cites several federal court and EAB cases regarding NEPA functional equivalency, it does not address the specific caselaw regarding SDWA and UIC permitting NEPA functional equivalency. *See* Petition at pp. 24-25, 32.

[3] The statutes include the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300f *et.seq*.; Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136 *et.seq*.; Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 *et.seq*.; Toxic Substances Control Act (TSCA), 15 U.S.C. § 136 et.seq.; and Marine Protection, Research, and Sanctuaries Act (MPRSA), 33 U.S.C. § 1401 et.seq. *See e.g*., *Envtl. Def. Fund, Inc. v. U.S. EPA*, 489 F.2d 1247 (D.C. Cir. 1973) (FIFRA); *State of Alabama v. EPA*, 911 F.2d 499 (11th Cir. 1990) (RCRA); *Warren County v. North Carolina*, 528 F. Supp. 276 (E.D.N.C. 1981 (TSCA); *Western Nebraska Res. Council v. U.S. EPA*, 943 F.2d 867 (8th Cir. 1991) (SDWA); *State of Maryland v. Train*, 415 F. Supp. 116 (D. Md. 1976) (MPRSA).

legislation [that] mandates specific procedures for considering the environment that are functional equivalents of the impact statement process.'" *Id.* at 871-872 (quoting and citing *State of Ala. ex rel. Siegelman v. U.S. EPA*, 911 F.2d 499, 504 (11th Cir. 1990) and cases cited therein).

Further, as discussed in the Region's Response to Public Comments, the EPA consolidated permitting regulations at 40 C.F.R. § 124.9(b)(6) specifically codify the functional equivalence doctrine and exempt certain EPA permitting actions, including the issuance of UIC permits, from NEPA:

> "…NPDES permits other than new sources as well as *all* RCRA, *UIC* and PSD permits are not subject to the environmental impact statement provisions of section 102(2)(C) of the National Environmental Policy Act, 42 U.S.C. 4321." 40 C.F.R. 124.9(b)(6) (emphasis added) [4]

The EAB first addressed 40 C.F.R. § 124.9(b)(6) in the UIC permitting context in *In re Am. Soda, LLP,* 9 E.A.D. 280, 290-292 (EAB 2000). In a challenge to EPA Region 8's issuance of a SDWA UIC Class III area permit, the EAB analyzed NEPA and the functional equivalence doctrine. The Board stated, "Notwithstanding NEPA's general application to major federal actions, courts have long recognized that NEPA's primary goal is to require government to consider the environmental consequences of its decision…[and] courts have developed the doctrine of 'functional equivalency' to ensure that NEPA remains consistent with its primary goal and does not add one more regulatory hurdle to the process." *In re Am. Soda*, 9 E.A.D. at 290. The Board described the functional equivalency test as providing that "where a federal agency is engaged primarily in an examination of environmental questions, and where substantive and procedural standards ensure full and adequate consideration of environmental

[4] EPA's longstanding view is that regulatory actions taken under SDWA are exempt from NEPA's EIS requirements. *See* 44 Fed. Reg. 64174 (Nov. 6, 1979).

issues, then formal NEPA compliance with NEPA is not necessary, [and] functional compliance [is]… sufficient." *Id.* at 290-291 (citing *Warren County v. North Carolina*, 528 F. Supp. 276, 286 (E.D.N.C. 1981)). The Board also noted that in *In re IT Corp.*, 1 E.A.D. 777 (Adm'r 1983) (RCRA), "the Administrator observed, '[T]he courts have recognized that Federal regulatory action taken by an agency with recognized environmental expertise, when circumscribed by extensive procedures, including public participation for evaluation of environmental issues, constitutes the functional equivalent of NEPA's requirements'" *In re Am. Soda*, 9 E.A.D. at 291 (citing *In re IT Corp.* 1 E.A.D. at 778). The EAB further noted that the Administrator held in *In re IT Corp.* that 40 C.F.R. § 124.9(b)(6) codified the caselaw on NEPA functional equivalence. *Id.*

Ultimately, in *In re Am. Soda*, the EAB found that 40 C.F.R. § 124.9(b)(6) was dispositive of the question of the UIC permit program's functional equivalence to NEPA, and under the plain language of the provision, Region 8 was not required to prepare an EIS in support of the UIC permit at issue there. *In re Am. Soda*, 9 E.A.D. at 291-292. *See also In re Beeland Group, LLC,* 14 E.A.D. at 205-206 (citing *In re Am. Soda,* 9 E.A.D. at 291 "Part 124 permitting regulations codify the functional equivalence doctrine and exempt UIC permit actions from NEPA's environmental impact statement requirement"; [40 C.F.R. § 124.9(b)(6) is]"'dispositive on the question of the UIC permit program's functional equivalence to NEPA[,]' and an environmental impact statement is not required for UIC permit issuance.") *Accord, In re Windfall Oil and Gas, Inc.* 16 E.A.D. 769, 811 (EAB 2015).

Region 8's Response to Public Comments explicitly addressed this line of cases. Attachment B, Document 001, Bates pp. 000316-000320. The Region also addressed these cases in a Memo to File documenting the NEPA functional equivalence of the permitting actions at

issue here. Attachment C, Document 263. Petitioner does not explain why Region 8's Response to Public Comments discussing these dispositive EAB cases regarding 40 C.F.R. § 124.9(b)(6) and the NEPA functional equivalence of the UIC permitting program is clearly erroneous or otherwise warrants review. In addition, Petitioner does not address these cases substantively in its petition for review. Petitioner simply notes the existence of 40 C.F.R. § 124.9(b)(6) without addressing that the EAB has expressly held that that 40 C.F.R. § 124.9(b)(6) is dispositive on the question of the UIC permit program's functional equivalence to NEPA. *In re Am. Soda,* 9 E.A.D. at 291-292*; In re Beeland Group, LLC,* 14 E.A.D. at 205-206; *In re Windfall Oil and Gas, Inc.* 16 E.A.D. at 811. Therefore, the Board should deny review of Petitioner's NEPA functional equivalence claims.

2. Review should also be denied because the Region provided many opportunities for public involvement and undertook an orderly environmental review process prior to issuance of the UIC permits, consistent with the NEPA functional equivalence doctrine.

The Board should also deny review of Petitioner's NEPA functional equivalence claims because the Region in no way committed any clear error or took action otherwise warranting review. To the contrary, the Region provided many opportunities for public involvement and Tribal consultation and undertook an orderly environmental review process consistent with the NEPA functional equivalence doctrine. No further environmental review is required. Petitioner's NEPA functional equivalence claims should be denied.

Courts have reasoned that EPA actions under statutes such as the SDWA are functionally equivalent to the review required under NEPA because they consider environmental impacts and provide an opportunity for public involvement. *See* 72 Fed. Reg. 53652, 53654 (Sept. 19, 2007). As discussed above, the U.S. Court of Appeals for the 8th Circuit held in *Western Nebraska Res. Council* that EPA does not need to comply with the formal requirements of NEPA in performing

its environmental protection functions under "organic legislation [that] mandates specific procedures for considering the environment that are the functional equivalents of the impact statement process… [and] that SDWA is such legislation…" *Western Nebraska Res. Council*, 943 F.2d at 871-872. Region 8 provided numerous opportunities for public involvement and undertook an orderly environmental review prior to issuing the UIC permits consistent with the NEPA functional equivalence doctrine. The Board should therefore deny review of the Petitioner's NEPA functional equivalence claims.

a. The Region provided extensive opportunities for public involvement and Tribal consultation prior to issuing the SDWA UIC permits.

As part of the permitting process, the Region provided many opportunities for public involvement and conducted extensive Tribal consultation prior to issuance of the UIC permits as discussed in the Factual and Procedural Background section above as well as below in section F, Tribal Consultation. The Region engaged in an extensive public review process for several years prior to issuing the UIC permits that included many opportunities for public comment, including holding multiple public comment periods and public hearings at different locations, as well as engaging in a substantial, nearly 5-year Tribal consultation process. *See* Response to Comments, Attachment B, Document 001, Bates pp. 000005-000007; 000233-000238, 000245-000253; *see also* Environmental Justice Analysis, Attachment D, Document 504, Bates pp. 042704-042705.

b. The Region undertook an orderly environmental review process prior to issuing the SDWA UIC permits.

The Region undertook an orderly environmental review process consistent with the SDWA and UIC regulations prior to issuing the UIC permits. This process included preparing a cumulative effects analysis pursuant to the SDWA UIC regulations at 40 C.F.R. § 144.33(c)(3) that considered the impacts associated with *inter alia* impacts to underground sources of drinking

water (USDW) and groundwater, surface water and wetlands, soil and geology, air quality, climate change, waste disposal and ecological resources including potential impacts to Federally-listed species under the Endangered Species Act. Attachment E, Document 367.

Petitioner appears to conflate the standards for NEPA cumulative impacts analyses under 40 C.F.R. §§ 1502.16 and 1508.1(g)(3) with the requirement for EPA to conduct a cumulative effects analysis for area permits at SDWA UIC regulations at 40 C.F.R. § 144.33(c)(3). This assertion is incorrect because these are two distinct requirements that should not be conflated with one another. As discussed above, SDWA actions are exempt from formal NEPA review. Instead, the Board and court precedent provide that SDWA is the functional equivalent of NEPA. EPA is not required to comply with the NEPA regulations, including for cumulative impacts. EPA is only required to comply with the SDWA UIC regulations. Therefore, the Board should only evaluate the Region's compliance with the SDWA UIC regulations to meet NEPA functional equivalence. In addition to the cumulative effects analysis prepared for the area permits under the SDWA UIC regulations described above, Region 8 complied with the detailed regulatory requirements in 40 C.F.R. parts 144 and 146, including a comprehensive technical review, to issue permits that are protective of USDWs.

Here, Region 8 also prepared a Biological Assessment (BA) in accordance with 40 C.F.R. § 144.4(c) and Section 7(a)(2), 16 U.S.C. § 1536(a)(2) of the Endangered Species Act and submitted the BA to the U.S. Fish and Wildlife Service (USFWS). Based on the information in the BA, Region 8 requested concurrence from USFWS that the UIC permitting actions and the associated aquifer exemption for the project may affect, but are not likely to adversely affect, the northern long-eared bat, the rufa red knot and the whooping crane. USFWS concurred with Region 8's conclusion that the project will not adversely affect listed species based on the

conservation measures identified in the BA for the listed species. Attachment F, Documents 482, 483, and 484. In addition, as discussed in the Board's Order Denying Motion to Amend, the Region complied with NHPA section 106. *See* Order at 2, 20-29.

Further, as part of its orderly environmental review, the Region prepared a detailed Environmental Justice (EJ) Analysis prior to issuing the permits consistent with Executive Order 12898 *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* as well as EPA's *Plan EJ 2014* and the *EPA Region 8 Regional Implementation Plan to Promote Meaningful Engagement of Overburdened Communities in Permitting Activities*. The EJ Analysis considered *inter alia* USDWs, surface water, air quality, and Tribal spiritual and cultural interests in the Black Hills. Attachment D, Document 504; Attachment G, Document 521; Attachment H, Document 528; Attachment I, Document 541.

Finally, as demonstrated by the substantial administrative record which consists of thousands of pages, the Region also considered many other documents regarding environmental issues prior to taking action on the UIC permits at issue here. For example, Region 8 reviewed and considered in detail the U.S. Nuclear Regulatory Commission (NRC)'s *Environmental Impact Statement for the Dewey-Burdock Project in Custer and Fall River Counties, South Dakota* and its supporting analyses. Attachment J, Document 441; Attachment K, Document 444. Other examples of the many documents considered by the Region include the South Dakota Department of Agriculture and Environmental Resources (DANR) Powertech (2013) Large Scale Mine Permit Recommendation, Attachment L, Document 391; Davis & Curtis, 2007, *Consideration of Geochemical Issues in Groundwater Restoration at Uranium In-Situ Leach Mining Facilities*, NUREG-CR-6870, Attachment M, Document 181; and Johnson et al, 2016, *Prediction of Uranium Transport in an Aquifer at a Proposed Uranium In Situ Recovery Site:*

Geochemical Modeling as a Decision-Making Tool, Chapter 4 in Management of Hazardous Wastes, (Attachment N, Document 208). *See also* Certified Index of Administrative Record for additional documents considered by the Region.

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

D. Safe Drinking Water Act

1. Adequacy of groundwater quality information

a. Petitioner's arguments about the adequacy of baseline groundwater quality information do not meet the standard of review because the Petitioner has not demonstrated that the permit decision is based on a clearly erroneous finding of fact or conclusion of law.

Petitioner's arguments about the adequacy of baseline groundwater quality information do not meet the standard of review because the Petitioner has not demonstrated that the permit decision is based on a clearly erroneous finding of fact or conclusion of law.

In its Petition for Review, Petitioner reiterates its baseline groundwater quality comments submitted to Region 8 during the comment period and fails to address the Region's response to these comments. Additionally, Petitioner fails to link its concerns to specific permit conditions or allege that the Permits or their provisions are not adequate to protect USDWs. Therefore, the Petition does not meet the standard of review, and the Board should deny review of this issue.

b. Petitioner's argument that all water quality sampling must be done before issuance of the permits directly contradicts the UIC regulations.

Petitioner alleges that there is no legal basis to collect water quality data following permit issuance instead of prior to permit issuance. However, as Region 8 explained in the Response to Public Comments, for Class III wells, this allegation is in direct conflict with the regulations. In the Response to Public Comments at Response #20, the Region explains the process set out in the UIC regulations for Class III formation testing. Attachment B, Document 001, Bates pp.

000126-000127. The regulations specify that prior to issuance of a permit, EPA need only review the *proposed* formation testing program, which should be designed to collect specific data, including physical and chemical characteristics of the formation fluids. *See* 40 C.F.R. § 146.34(a)(8); *see also* 40 C.F.R. § 146.32(c). As explained in Responses #19 and #25, the Region also reviewed the water quality data provided in the Class III permit application (Attachment O, Documents 260 and 261) and determined that it met the regulatory requirements and were adequate for developing permit conditions protective of USDWs. Attachment B, Document 001, Bates pp. 000126, 000130-000131.

After issuance of the permit, the regulations and the Class III permit require the appropriate tests, which include formation testing. 40 C.F.R. § 146.32(b) ("Appropriate logs and other tests shall be conducted during the drilling and construction of new Class III wells."). It is only after this that EPA must consider "[t]he results of the formation testing program to obtain the information required" prior to granting approval for the operation of a Class III well. 40 C.F.R. § 146.34(b)(4). The Board upheld such a requirement for additional analysis and sampling of groundwater data after issuance of a permit in *In re American Soda, LLP,* 9 E.A.D. 280. In that case, the Board found that the Region had met the requirements of the UIC regulations by considering the data in the application, the regional data known at the time of the application, and comments submitted to the Region, and determined that including permit requirements to further characterize groundwater after permit issuance was not clearly erroneous. The Board stated that "[w]hile [40 C.F.R. § 146.34(a)(4)] contemplates that *available* information of the kind referenced be considered by the permitting authority in issuing a permit, it does not preclude the issuance of a permit that includes provision for further groundwater characterization post-permit issuance." *In re American Soda, LLP,* 9 E.A.D. at 296.

The Class III permit and the Class V permit follow the process in the UIC regulations.[5] Both permits require the Permittee to report the results of formation water quality testing in Injection Authorization Data Package Reports before the Permittee may obtain authorization from EPA to commence injection. Part II, Sections H and I of the Class III Area Permit (Attachment P, Document 109, Bates pp. 010483-010486) and Part II, Section A of the Class V Area Permit (Attachment Q, Document 281, Bates pp. 024438-024439). Notwithstanding EPA's thorough explanation of this issue in the Response to Public Comments, Petitioner does not address the Region's response in its Petition. Accordingly, the Board must deny review.

c. The prohibition of fluid movement standard at 40 C.F.R. § 144.12(a) does not require that all site-specific groundwater quality information be submitted to EPA and analyzed by EPA prior to issuance of a permit.

Petitioner argues that gathering additional information after permit issuance indicates that the applicant has not met its burden to show that the requirements of 40 C.F.R. § 144.12(a) have been met. As an initial matter, Petitioner's argument regarding 40 C.F.R. § 144.12(a) was not raised during the comment period by Petitioner or any other commenter. As explained above, commenters must "submit all reasonably available issues and arguments supporting their position" during the comment period. Therefore, this argument is waived. *See* 40 C.F.R. § 124.13; *In re MPLX,* 18 E.A.D. 228, 243 (EAB 2020); *In re Gen. Elec. Co*., 17 E.A.D. 434, 445 (EAB 2018).

[5] The regulations do not include specific criteria and standards for Class V wells because it is a catch-all category, and most Class V operations are authorized by rule. *See* 40 C.F.R. §§ 144.24, 144.25, 146.51. Where a Director determines that a permit is necessary for a Class V operation to be protective of USDWs, the Director must use the authority in 40 C.F.R. § 144.51 and 144.52 to write permit conditions and has discretion to determine what conditions may be necessary to prevent migration of fluids into USDWs or otherwise assure compliance with SDWA.

Even if this argument had been preserved for review, Petitioner inaccurately interprets the regulation, which states:

> No owner or operator shall construct, operate, maintain, convert, plug, abandon, or conduct any other injection activity in a manner that allows the movement of fluid containing any contaminant into underground sources of drinking water, if the presence of that contaminant may cause a violation of any primary drinking water regulation under 40 C.F.R. part [141] or may otherwise adversely affect the health of persons. The applicant for a permit shall have the burden of showing that the requirements of this paragraph are met.

40 C.F.R. § 144.12(a).

As explained in the Federal Register preamble for the final rule, this provision is a "general prohibition" that provides "the basic requirements of the UIC program up front," and is followed by more specific regulations that explain how applicants must meet their burden to effectuate the endangerment standard set out in 40 C.F.R. § 144.12. 45 Fed. Reg. 33290, 33330 (May 19, 1980). Namely, 40 C.F.R. § 144.31 details the specific information that must be submitted in an application. Area permit applicants must also submit the information specified in 40 C.F.R. § 144.33. Class III applicants must also provide the information described in 40 C.F.R. § 146.34(a).

Here, as explained fully in Section D.1.b., Region 8's review found that the water quality data submitted by the applicant met the specific regulatory requirements applicable to the Permits. "[T]he regulations accord considerable discretion to the Regional Administrator in determining an application's sufficiency. 40 C.F.R. § 144.31 states, 'An application for a permit is complete when the Director receives an application form and any supplemental information which are completed to his or her satisfaction.'" *In re American Soda*, 9 E.A.D. at 295. Accordingly, the Board should deny review of Petitioner's 40 C.F.R. § 144.12(a) argument on procedural or alternatively, on substantive grounds.

d. Region 8 thoroughly considered cumulative effects of the construction and operation of additional wells.

Petitioner argues that having incomplete baseline water quality data before the permit was issued prevented EPA from analyzing cumulative effects of the injection wells under 40 C.F.R. § 144.33(c)(3)[6]. While Petitioner does not specify that the concern is about the groundwater section of the Cumulative Effects Analysis ("CEA"), the Region assumes this is the concern given the fact that baseline water quality information is a groundwater-related issue in this context.

Contrary to Petitioner's claim, Region 8 thoroughly considered potential cumulative effects of the additional wells on groundwater. This is documented in the CEA at Section 3.3 Potential Groundwater Quality Impacts, which is a 20-page analysis of potential cumulative effects on groundwater quality. Attachment E, Document 367, Bates pp. 027926-027946. Petitioner does not articulate why it would be necessary to have comprehensive site-specific water quality information to be able to assess potential impacts to groundwater and why the absence of it constitutes clear error or would otherwise warrant review. "General statements, rather than specific arguments as to why the Region's responses are erroneous or an abuse of discretion do not meet prerequisites for review." *In re Beeland Group* 14 E.A.D. at 200. Furthermore, the Petitioner does not raise any specific concerns with the analysis of groundwater impacts in the CEA. In addition to the lack of specific concerns about the analysis, Petitioner does not link its concerns to specific permit conditions and explain why the Permits or their provisions are not adequate to protect USDWs. Accordingly, the Board should deny Petitioner's cumulative effects argument.

[6] As discussed in Section C, the cumulative effects analysis required under the SDWA UIC regulations is distinct from the cumulative impacts analysis required under NEPA.

2. Adequacy of hydrogeological analysis

a. Petitioner's arguments about the adequacy of EPA's hydrogeological analysis do not meet the standard of review because the Petitioner has not demonstrated that the permit decision is based on a clearly erroneous finding of fact or conclusion of law.

In its Petition for Review, the Petitioner relies on its hydrogeologic comments submitted to the Region during the comment period and fails to address the Region's response to these comments. As discussed in Section D.2.b. below, Region 8 provided specific responses to comments about hydrogeology, and the Petition fails to confront them. Additionally, Petitioner does not link its concerns to specific permit conditions and allege that the Permits or their provisions are not adequate to protect USDWs. Therefore, the Petitioner has not met the standard of review, and the Board should deny review of this issue.

b. The Petitioner fails to acknowledge that the UIC regulations explicitly requires that the applicant only needs to supply preliminary hydrogeologic information prior to issuance of a permit and that "appropriate logs and other tests" must be done after construction of the wells but prior to approval for injection.

Similar to its argument about the collection of water sampling information, the Petitioner argues that EPA provides no lawful reason to require the collection of hydrogeological data after the issuance of a permit. However, as the Region explained in Response #4 of the Response to Public Comments, the UIC regulations only require submittal of information specified in 40 C.F.R. § 146.34(a) prior to issuance of a Class III permit, not a full characterization of the geology and groundwater. Attachment B, Document 001, Bates pp. 000106-000112. The regulations provide that prior to issuance of a permit for construction of a Class III well, the Director shall consider the following hydrogeologic information: (1) a map of the project area and area of review showing existing producing wells, injection wells, abandoned wells, dry holes, public water systems and water wells and *may* also show surface water bodies, mines,

quarries, and faults *if known or suspected. "Only information of public record and pertinent information known to the applicant is required to be included on this map."* (40 C.F.R. § 146.34(a)(2) (Emphasis added)); (2) maps and cross sections indicating the vertical limits of all underground sources of drinking water within the area of review, their position relative to the injection formation, and the direction of water movement, where known, in every underground source of drinking water which may be affected by the proposed injection (40 C.F.R. § 146.34(a)(4)); (3) maps and cross sections detailing the geologic structure of the local area (40 C.F.R. § 144.34(a)(5)); (4) generalized map and cross sections illustrating the regional geologic setting (40 C.F.R. § 146.34(a)(6)).

The UIC regulations also require that "appropriate logs and other tests shall be conducted during the drilling and construction of new Class III wells. A descriptive report interpreting the results of such logs and tests shall be prepared by a knowledgeable log analyst and submitted to the Director." 40 C.F.R. § 146.32(b). These logs and tests must be reviewed by the Director *prior to granting approval for the operation* of a Class III well, not before issuance of a permit, as the Petitioner argues. 40 C.F.R. § 146.34(b)(1).

The process described above is the process EPA Region 8 followed for the Class III Permit. As described in Response #4, the Region summarized its evaluation of the geological and hydrological analysis provided in the Class III permit application, including the adequacy of confining zones, in Sections 3.0 and 4.0 of the Fact Sheet for the draft Class III Area Permit. Attachment B, Document 001, Bates p. 000107. Region 8 reviewed drillhole logs, cross sections, and pump test data to evaluate the confining zones for the proposed injection intervals. In addition, the Region reviewed the Tennessee Valley Authority (TVA) pump test reports (Attachment R, Document 017 and Document 018), which did not provide any information that

contradicts the geologic and hydrologic characterization in the Class III Permit Application. Region 8 also reviewed geologic maps of the project area and surrounding areas and read USGS reports describing geologic and hydrologic conditions in the vicinity of the Dewey-Burdock project site. Responses #4 and #8 provide detailed responses to public comments about breccia pipes, fractures, joints, faults, and prior aquifer pump test data. Attachment B, Document 001, Bates pp. 000106-000112, 000114-000115.

Additionally, Region 8 used Regional Applied Research Effort funding from the EPA Office of Research and Development (ORD) to work cooperatively with the U.S. Geological Service (USGS) and ORD to conduct independent analyses of groundwater and develop a reactive transport model in the Burdock Area to provide information about the fate and transport of ISR contaminants at the site. Attachment S, Documents 148 and 149. The USGS reactive transport model helped inform the permit requirements for Part IV of the Class III Area Permit for further development of the conceptual site model (CSM) and geochemical modeling of the site. Therefore, the information the Region reviewed for its preliminary evaluation of geologic suitability exceeded the requirements in 40 C.F.R. § 146.34(a), prior to issuance of the Class III area permit.

Consistent with 40 C.F.R. §146.32(b) and 146.34(b), the Class III area permit requires Powertech to conduct a number of additional tests and submit a report to EPA before EPA will issue an authorization to inject into the wells. Part II, Section H enumerates the information that Powertech must submit to EPA, and Part II, Section I details what that information must demonstrate in order for EPA to authorize injection. Attachment P, Document 109, Bates pp. 010483-010486. This information must confirm that injection into the wells will not endanger USDWs, including that there is vertical confinement of the injection interval and that corrective

action has been performed to the extent that hydraulic control of injection interval fluids will be maintained during ISR activities. Petitioner also does not address the Region's responses that wellfield testing and sampling should be done after permit issuance but before authorization to inject because the Permits establish appropriate standards for construction and testing and ensure that the standards are enforceable. *See* Attachment B, Document 001, Responses #14, Bates p. 000122-000123; #20, Bates p. 000126-000127; #35, Bates p. 000135-000136; #36, Bates p. 000136; #118, Bates p. 000191-000192.

The Board has confirmed the reasonableness of this approach in previous cases and explained that this is a technical decision where the Board defers to a Region's technical expertise and experience. *See In re Envotech L.P.*, 6 E.A.D 260, 284 (EAB 1996) (the Board upheld EPA's approach making a preliminary decision of geologic suitability where the Region only authorized the permittee to drill, construct, and test the wells and would analyze site-specific data gathered after permit issuance to make a final determination as to geologic suitability, stating, "absent obvious flaws in the Region's technical judgment that the site is 'geologically suitable' for drilling, construction, and further testing, the Region's decision will be upheld."); *In re Beeland,* 14 E.A.D. at 199 (In upholding EPA's approach in determining sufficient impermeability of confining layer with currently known information prior to permit issuance and providing for further testing and reporting after permit issuance, the EAB stated "[t]he permeability of the Bell Shale formation is a technical issue that relies significantly on the Region's expertise and experience, and in such cases, the Board generally defers to the Region's judgment." *In re Envotech*, 6 E.A.D. at 284. The Board should similarly uphold EPA Region 8's approach and deny review here.

c. The prohibition of fluid movement standard at 40 C.F.R. § 144.12(a) does not require that all site-specific hydrogeologic information be submitted to EPA and analyzed by EPA prior to issuance of a permit.

Again, Petitioner argues that gathering information after permit issuance, here regarding site-specific hydrogeological information, indicates that the applicant has not met its burden to show that the requirements of 40 C.F.R. § 144.12(a) have been met. The Region reiterates the arguments in Section D.1.c. First, this argument was not raised during the comment period and is therefore waived. Second Petitioner does not accurately interpret this regulation, which is a general prohibition, not a requirement to gather all site-specific information prior to permit issuance. Therefore, the Board should deny review of Petitioner's 40 C.F.R § 144.12(a) argument on procedural and substantive grounds.

d. The public had meaningful opportunity to review and comment.

The Petitioner argues that requiring additional testing following permit issuance deprives the public of meaningful comment on EPA's permitting process. However, in addition to the fact that the Region's permitting process followed the process in the UIC regulations, EPA provided the public ample opportunity to review and comment on the permit conditions. Both comment periods were extended due to requests from the public. The first public comment period lasted over 100 days, from March 6, 2017, to June 19th, 2017. The second public comment period lasted over 100 days, from August 26, 2019, to December 11, 2019. As discussed in Responses #36 and #118, the Permits detail the types of additional testing required, the specific information sought by EPA, and the demonstrations that need to be made in order for Powertech to obtain authorizations to inject from EPA. Attachment B, Document 001, Bates pp. 000135-000136, 000191-000192. The site-specific data gathered from wellfield testing only informs whether the demonstrations have been met. The public does not need the site-specific data to comment on

whether the permit's conditions are adequate to protect USDWs. The Petitioner did not specify any concerns with the types of testing required, the types of information sought, the demonstrations that must be made, or any other conditions of the permits. The Petitioner does not confront EPA's responses or assert any concerns about the adequacy of the permit conditions to protect USDWs. Thus, the Petitioner has not met the standard of review, and review of this issue should be denied.

e. Region 8 thoroughly considered cumulative effects of the construction and operation of additional wells.

Petitioner echoes its argument about cumulative effects here, alleging that deferring collection of additional data prevented EPA from being able to analyze cumulative effects of the injection wells under 40 C.F.R. § 144.33(c)(3). The Region reiterates its arguments from Section D.1.d. and emphasizes that the Petitioner does not raise any specific concerns with the analysis of groundwater impacts in the Cumulative Effects Analysis and does not link its concerns to specific permit conditions and explain why the Permits or their provisions are not adequate to protect USDWs. Accordingly, the Board should deny review of Petitioner's cumulative effects argument.

f. EPA adequately addressed the issue of potential boreholes in the project area, and the Petitioner does not assert the permit conditions are inadequate to prevent endangerment to USDWs from boreholes or otherwise support a claim of clear error.

Petitioner raises the issue of boreholes several times and suggests that that EPA has a duty to analyze whether Powertech could find and plug all boreholes as well as "affirmatively request and conduct a comprehensive review" of borehole data to make conclusions about boreholes under the UIC regulations, prior to issuance of a permit. Contrary to Petitioner's assertion, there is no regulatory requirement that EPA analyze whether Powertech could find and

plug all boreholes prior to issuance of a permit. The Petitioner cites to no authority to support its claim.

As explained in Response #14, there is no requirement in the UIC regulations to locate and identify all boreholes in the project area prior to issuance of a permit, nor does EPA find it necessary to do so to protect USDWs. Attachment B, Document 001, Bates pp. 000122-000123. In 40 C.F.R. § 146.34(a)(2), it is required that the Director consider a "map showing the injection well or project area for which a permit is sought and the applicable area of review. Within the area of review, the map must show the number or name and location of all existing producing wells, injection wells, abandoned wells, dry holes, public water systems and water wells…. *Only information of public record and pertinent information known to the applicant is required to be included in this map*." (Emphasis added). Consistent with this regulatory requirement, Powertech submitted information about known drillholes in its application. Attachment T, Document 238, Bates p. 019000 and Attachment U, Document 249.

Region 8 addressed boreholes in the Response to Public Comments. Responses #13 and #14 explain that Region did consider boreholes in its evaluation and details how the Class III permit addresses them in order to prevent endangerment of USDWs. Attachment B, Document 001, Bates pp. 000122-000123. Part II of the Class III Area Permit requires the Permittee to take steps to identify leaky historic drillholes near the wellfield areas during the design and implementation of the wellfield pump tests (Section C), during the design of the wellfield monitoring system (Section D), during the implementation of formation testing (Section E), and during the implementation of the corrective action requirements in Part III. Attachment P, Document 109, Bates pp. 010474-010481. The Permittee must complete these actions prior to receiving authorization to inject, to prevent these drillholes, or any other type of confining zone

breach, from acting as pathways for contamination of USDWs. Petitioner does not confront the Region's responses on this subject nor assert that these provisions are not adequate to protect USDWs.

3. Conclusion

In conclusion, none of Petitioner's SDWA arguments have merit. The Petition does not confront the Region's responses to comments on either the groundwater quality or hydrogeological analysis issues and therefore has not met its burden to demonstrate that the Region's responses were clearly erroneous or otherwise warrants review. Furthermore, the Petition does not link its concerns to specific permit conditions or otherwise assert the Permits are not adequate to protect USDWs.

E. Administrative Law Principles

1. The Board should deny review of Petitioner's claim that the administrative record is inadequate because it has not met its burden to demonstrate a clearly erroneous finding of fact or conclusion of law.

In its Petition for Review, the Petitioner claims that the Region's administrative record is inadequate due to omission of documents that are not required to be in the record under 40 C.F.R. § 124.18. The Petitioner relies on the same objections submitted to EPA during the comment period and fails to address EPA's response to these comments, found at Responses #184 and #185. Attachment B, Document 001, Bates pp. 000236-000238. Therefore, the Petitioner has not met the standard of review, and the Board should deny review of this issue.

Petitioner points to a number of documents obtained via a Freedom of Information Act request and asserts that the administrative record is inadequate because these documents are omitted from it. As explained in Responses #184 and #185 in the Response to Public Comments, these documents pre-dated submission of the final permit application in 2013, were not considered by Region 8 to inform its decision, and are not required to be part of the final

administrative record under 40 C.F.R. § 124.18. Attachment B, Document 001, Bates pp. 000236-000238. These documents were communications between Powertech and EPA Region 8 "for the purpose of providing technical assistance to Powertech to develop complete UIC permit applications, not to acquire information from them to inform permitting or aquifer exemption decisions. These communications are not appropriately part of this administrative record." Attachment B, Document 001, Bates p. 000238. Petitioner does not acknowledge Region 8's response and explain why it believes the response demonstrates clear error nor why these documents are relevant to the permitting decisions before EPA. Instead, the Petitioner vaguely asserts that the decisions were arbitrary and capricious because they "failed to consider an important aspect of the problem." The Region is unable to ascertain what the Petitioner believes to be important from these documents relative to the Permits and permit conditions or why they are required to be in the administrative record as defined by 40 C.F.R. § 124.18. While the Petitioner specifically raises concern about the area of review/aquifer exemption boundary discussion document discussed in Response #184 (*see* Petition for Review, Attachment 30) and claims that the document is a "de facto guidance" document, the Petitioner never raises any substantive and specific concern that the area of review for either the Class III or Class V permit are inappropriate or inadequate.

As explained in Response #184, the document referenced by Petitioner is neither a de facto rule nor agency guidance. The Area of Review of a UIC project area is a site-specific determination and is determined by criteria set out in 40 C.F.R. § 146.6. Region 8 explained how it arrived at the area of review using these criteria in the Class III Fact Sheet, and the public, including Petitioner, had the opportunity to review and comment on that information about the area of review and compare it to the criteria in the UIC regulations. Attachment V, Document

171, Bates p. 014689. Yet the Region received no comments about the Area of Review for either the Class III or Class V Permit from the Petitioner or any other commenter. The document of concern was drafted by Region 8 staff for purposes of discussion (*see* Response #184, Attachment B, Document 001, Bates pp. 000236-000237), does not provide any site-specific information about the Dewey Burdock project, was not considered or relied on by the Region in evaluating the permits, and therefore is not appropriately part of the administrative record. *See In re Gen. Elec. Co.,* 18 EAD 575, 608 (EAB 2022) (Explaining that EAB review is generally limited to the certified administrative record and noting "[t]his is consistent with the administrative law principle that the 'record for an agency decision includes all documents, materials, and information that the agency relied on directly or indirectly in making its decision.'"). The Board has explained in prior cases that "the petitioner bears the burden of overcoming the strong presumption that the Agency did not improperly exclude documents from the administrative record." *Id*. at 609. The Petitioner has not met this burden, as they do not point out why the Region's responses in #184 and 185 are clearly erroneous or otherwise articulate why these documents should be part of the administrative record. Therefore, the Board should deny review of this issue.

2. Petitioner's argument that the UIC regulations are inadequate and that a rulemaking is needed in order to regulate in-situ mining of uranium is outside the scope of the Board's review authority.

Petitioner's second group of arguments related to the administrative law principles are outside the scope of the Board's review authority, as they concern allegations that the UIC regulations are inadequate to protect USDWs from in-situ mining of uranium and require rulemaking. The Board's jurisdiction has historically been limited to "evaluation of specific UIC permit terms and the permit issuer's compliance with the SDWA and UIC permit regulations." *In re Envtl. Disposal Systems, Inc.,* 12 E.A.D. 254, 267 (EAB 2005) (citing *In re Puna Geothermal*

Venture, 9 E.A.D. 243, 258-59, 274 (EAB 2000); *In re Terra Energy Ltd*., 4 E.A.D. 159, 161 & n.6 (EAB 1992)). Petitioner's arguments that a rulemaking is necessary falls outside the scope of evaluation of EPA's compliance with the SDWA and UIC permit regulations. The Board has directly addressed this issue previously and determined that it is not the appropriate forum to decide challenges to the UIC regulations. *See In re Jordan Development Co.,* 18 E.A.D. at 12; *In re FutureGen Indus. All., Inc.*, 16 E.A.D. 717, 724 (EAB 2015).

Additionally, Petitioner relies on its previously submitted comments that the UIC regulations are not adequate because ISL mining is controversial and that this is EPA's first UIC ISL uranium issued permit. Region 8's Response #182 addresses this concern and explains that the UIC regulations provide explicit authority to issue UIC permits for the purpose of in-situ recovery of uranium. Attachment B, Document 001, Bates pp. 000234-000235. In addition, the UIC regulations provide specific criteria and standards applicable to Class III wells at 40 C.F.R. § 146.31 to 146.34. Petitioner does not argue that the Permits or any specific permit conditions are not adequate to protect USDWs. Petitioner does not address the Region's response to its comment in the Petition for Review and has not established clear error.

Based on the arguments above, the Board should deny review of this issue.

F. Tribal Consultation

The Great Plains Tribal Water Alliance, Inc. (Alliance) filed an amicus brief arguing that the Region failed to conduct Tribal consultation pursuant to Executive Order 13175,[7] the EPA Policy on Consultation and Coordination with Indian Tribes ("*EPA Tribal Consultation Policy*"),[8] and the EPA Region 8 Policy for Environmental Protection in Indian Country

[7] Consultation and Coordination With Indian Tribal Governments, 65 FR 67249 (Nov. 6, 2000); Attachment W, Document 045.

[8] Attachment X, Document 043.

("*Region 8 Policy*"),[9] and that therefore, the Region's issuance of the UIC permits was arbitrary, capricious, and an abuse of discretion under the Administrative Procedure Act (APA), 5 U.S.C. §706(2)(A). Amicus Brief at 2.

As a threshold matter, the Board should deny review of the Alliance's arguments due to procedural deficiencies. In the alternative, it should deny review because the administrative record demonstrates that the Region conducted an extensive Tribal consultation process consistent with the Executive Order and the two cited Tribal policies. The Region consulted over a nearly five-year period, with 38 federally-recognized Tribes, including Petitioner. Finally, although the Board need not reach this issue, the Executive Order and the two cited Tribal policies are not enforceable. Consequently, the Alliance's arguments are without merit.[10]

1. The Board should deny review of the amicus brief for procedural deficiencies.

a. The amicus brief improperly raises new arguments that should have been filed in a petition, not an amicus brief, and the Alliance missed the deadline to file a petition.

The Board's decisions hold that litigants are barred from raising new issues in amicus briefs, which are not raised in a petition, and which are filed after the deadline to petition for review. These untimely new issues should be denied as late filed petitions. *In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 595 & n. 168 (EAB 2006) (explaining Board precedent and denying review of untimely new arguments raised in an amicus brief "rather than in a timely petition"); *In re Palmdale Hybrid Power Plant*, PSD Appeal No. 11-07 (EAB April

[9] Attachment Y, Document 963.

[10] The Alliance also references the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP), but does not argue it is enforceable under the APA. Amicus Brief at 5. The Region's Response to Public Comments document addressed UNDRIP, noting it is not enforceable. Attachment B, Document 001, Bates pp. 00264, Response #228.

27, 2012) (Order Denying Motion to Intervene) ("issues [that] should have been timely raised in a petition for review . . . may not be raised belatedly in an . . . amicus curiae brief").

In this case, the Alliance argues that EPA failed to conduct Tribal consultation pursuant to (1) Executive Order 13175, (2) the *EPA Tribal Consultation Policy*, and (3) the *Region 8 Policy*. Amicus Brief at 2 (EPA failed "to comply with the over-arching government-to-government consultation requirements of E.O. 13175 and the [*EPA Tribal Consultation Policy* and *the Region 8 Policy*]. . . ."). Critically, the Petition did not argue that EPA failed to conduct Tribal consultation under those three documents. In fact, the Petition did not refer to *any* of those three documents. Instead, the Petition argued that EPA failed to comply with the NHPA, NEPA, SDWA and the APA. Petition at 8-9. While the Petition argues that EPA failed to conduct adequate *NHPA consultation*, that is separate and distinct from *Tribal consultation* under the Executive Order and the two Tribal policies. Moreover, the amicus brief confirms this distinction. The Alliance explicitly distinguishes between NHPA consultation and Tribal consultation. Amicus Brief at 2.

Further, the Alliance missed the deadline to file its own petition. The deadline to file a petition for review is 30 days after the Region serves notice of issuance of the UIC permits. 40 C.F.R. §124.19(a)(3). Here, the Region served notice on November 24, 2020, but the Alliance filed its amicus brief more than 30 days later – on January 14, 2021. As a result, the Board should deny review of the amicus brief.

b. Arguments related to the *Region 8 Policy* were not raised in public comments.

The Board should deny review of the Alliance's arguments regarding the *Region 8 Policy* because of procedural deficiencies. The Board's rules and decisions require that issues be raised in public comments in order to be preserved for appeal. 40 C.F.R. §124.19(a)(4)(ii). The Board

has "routinely denied review of an issue where it was reasonably ascertainable but not raised in comments on the draft permit." *In re Arizona Public Service Co.*, 18 E.A.D. 245, 304 (EAB 2020) (citations omitted).

In this case, the Alliance did not submit any public comments. Moreover, the Region is not aware of any public comments that raised the *Region 8 Policy*. Additionally, these issues were reasonably ascertainable to the Alliance during relevant public comment periods. An EPA Region 8 website makes the *Region 8 Policy* available to the public.[11] As a result, the Board should deny review of the Alliance's arguments concerning the *Region 8 Policy*.

c. The amicus brief fails to cite to the administrative record.

The Alliance failed to comply with Board rules for demonstrating that issues raised in petitions were raised in public comments, for citing to the relevant comment and response, and for explaining why the Region's responses to comments were clearly erroneous or otherwise warrant review. *See* "Standard of Review" section above; 40 C.F.R. §124.19(a)(4)(ii). These requirements apply equally to amicus briefs. 40 C.F.R. §124.19(e) ("Amicus briefs must comply with all procedural requirements of this section."). Thus, the Board should deny review of the amicus brief.

In this case, the Alliance does not cite to the administrative record, such as the Region's Response to Public Comments document, to demonstrate that its arguments were raised in public comments. Moreover, although the Region's Response to Public Comments document addresses comments related to Executive Order 13175 and the *EPA Tribal Consultation Policy*, the Alliance does not cite the Region's responses nor explain why they were clearly erroneous or otherwise warrant review. Attachment B, Document 001, Bates pp. 000245-000247,000251-

[11] https://www.epa.gov/tribal/region-8-tribal-affairs-branch

000253, Responses #200, 201, 207, 208 and 211. Also, as explained above, Region 8 is not aware of any public comments that raised the *Region 8 Policy*. As a result, the Board should deny review of the amicus brief.

2. The Region followed the *EPA Tribal Consultation Policy* and the *Region 8 Policy*.

a. The Region conducted an extensive Tribal consultation process that was consistent with the *EPA Tribal Consultation Policy*.

The Alliance argues that EPA failed to conduct Tribal consultation pursuant to the *EPA Tribal Consultation Policy*, particularly in regard to Petitioner. Amicus Brief at 2. Not so. The administrative record demonstrates that the Region followed the *EPA Tribal Consultation Policy* by conducting an extensive Tribal consultation process with 38 federally recognized Tribes, including Petitioner, for nearly 5 years. Attachment B, Document 001, Bates pp. 000245-000247 and 000301-000308.

The bulleted list below provides specific examples of the Region's Tribal consultation process with citations to the administrative record. In brief summary, beginning in November 2015, the Region notified 38 federally-recognized Tribal governments of the UIC permit applications and offered government-to-government Tribal consultation meetings. The Region subsequently held Tribal consultation meetings with 12 Tribal governments, including Petitioner, to receive their input. The Region considered Tribal government input before taking final actions on the UIC permit applications, and in November 2020 shared the Region's *Response to Public Comments* document with Tribal governments to explain how their input was considered in the Region's final actions.

The record also demonstrates thorough Tribal consultation with regard to Petitioner specifically. For example, the Region held four government-to-government Tribal consultation

meetings with Petitioner between November 2015 and November 2020.[12] The Region offered additional government-to-government consultation opportunities, but Petitioner did not accept them. Further, although the Region had set an April 30, 2020 deadline to complete Tribal consultation meetings, it extended that deadline to provide more time to meet with Petitioner. Months later, in September 2020, the Region explained to Petitioner that the UIC permit applications had been pending since January 2013, that it would soon make final decisions on the applications, and emphasized the importance of the government-to-government Tribal consultation meeting with Petitioner and the Region scheduled for October 2020. But later, Petitioner cancelled that meeting. Finally, in November 2020 the Region issued the UIC permits, and shared the EPA Response to Public Comments document with the Petitioner and other Tribal governments to explain how their input was considered in the Region's final actions.

The following is a non-exhaustive list that provides examples of the Region's nearly five-year Tribal consultation process, with citations to the administrative record, and with an emphasis on government-to-government Tribal consultation with Petitioner.

- November 25, 2015: Letter from the Region to 38 Tribal governments, including Petitioner, offering government-to-government Tribal consultation. Attachment Z, Documents 692 – 730.

- February to June 2016: The Region held government-to-government consultation meetings with 9 Tribes in response to its November 25, 2015 letter, including Petitioner. Among its other meetings, the Region met twice with Petitioner, on 4/28/2016 and 6/17/2016.[13] Attachment AA, Documents 914 - 919; Attachment BB, Documents 854 - 856; Attachment CC, Document 860; Attachment B, Document 001, Bates pp. 000301 – 000308, Response #253, Table 1.

[12] April 28, 2016; June 17, 2016; July 18, 2016; and August 28, 2020.

[13] Under its Tribal law, Petitioner did not consider these meetings between the Region and Tribal government officials as government-to-government Tribal consultation. Nonetheless, they were consistent with the *EPA Tribal Consultation Policy*, which states that "[t]here is no single formula for what constitutes appropriate consultation," and further states that the Input Phase of Tribal consultation allows flexibility in obtaining Tribal government input ("This phase may include a range of interactions."). Attachment X, Document 043, Bates pp. 002521, 002519.

- June 30, 2016: Two letters from the Region to Petitioner, offering further government-to-government Tribal consultation meetings and a community outreach plan. Attachment DD, Documents 857–858.

- July 18, 2016: Government-to-government consultation meeting between The Region and Petitioner.[14] Attachment EE, Document 859.

- June 2017: Letter from the Region offering government-to-government Tribal consultation meetings on draft UIC permits to 5 Tribal governments, including Petitioner. These five Tribes had previously indicated interest in further Tribal consultation. Attachment FF, Documents 734–738.

- July 19, 2017: Petitioner submitted public comments to the Region. While not part of Tribal consultation, Petitioner submitted over 2,000 pages of public comments to the Region, which undercuts the allegation that Petitioner lacked the opportunity to provide input to the Region. Attachment GG, Document 864, Bates pp. 088507 – 090641.

- August 2017: Government-to-government Tribal consultation meeting between the Region and the Ponca Tribe of Nebraska in response to the Region's June 2017 letter. Attachment HH, Document 920.

- July 8, 2019: Letter from the Region to 38 Tribal governments, including Petitioner, offering further government-to-government Tribal consultation meetings on revised draft UIC permits. Attachment II, Documents 739 – 776.

- September to November 2019: The Region held 3 government-to-government Tribal consultation meetings in response to its July 8, 2019 letter. The Region met with the Cheyenne and Arapaho Tribes, the Santee Sioux Nation, and the Cheyenne River Sioux Tribe. Attachment JJ, Documents 921 – 923.

- August 2, 2019: Letter from Petitioner requesting Tribal consultation, in response to the Region's July 8, 2019 letter. Attachment KK, Document 866.

- August 2019 to January 2020: The Region sent 5 emails to Petitioner offering to schedule a government-to-government Tribal consultation meeting. Petitioner did not schedule a meeting. The emails were dated 8/5/2019, 8/22/2019, 9/17/2019, 10/21/2019, and 1/16/2020. Attachment LL, Documents 887 - 888, Bates pp. 091237, 091303, 091305, 091311, 091314, 91316 – 091318.

- December 9, 2019: Petitioner submitted public comments to the Region. While not part of Tribal consultation, Petitioner submitted over 450 pages of public comments to the Region. Attachment MM, Documents 868 – 869.

[14] *See* footnote 13.

- February 2020: Letter from the Region offering further government-to-government Tribal consultation meetings to 15 Tribal governments, including Petitioner. These 15 Tribes had previously indicated interest in further Tribal consultation. The Region set a deadline to hold Tribal consultation meetings by 4/30/2020, but later extended that deadline. Attachment NN, Documents 777 – 792, 851.

- March 23, 2020: The Region and Petitioner had scheduled an in-person, government-to-government Tribal consultation meeting on this date, but the Region cancelled due to the pandemic. The Region offered to hold the meeting by conference call, but Petitioner did not respond. Attachment LL, Document 888, Bates p. 091323.

- June 24, 2020: The Region and Petitioner had scheduled an in-person, government-to-government Tribal consultation meeting on this date, but the Region cancelled due to the pandemic. By letter dated 6/23/2020, the Region offered to hold another government-to-government meeting by videoconference or conference call. Attachment OO, Document 874.

- July 20, 2020: The Region held a government-to-government Tribal consultation meeting with the Santee Sioux Tribe in response to its February 2020 letters. Attachment PP, Document 924.

- August 19, 2020: Email from the Region to Petitioner offering multiple, government-to-government meetings. Attachment QQ, Document 875.

- August 28, 2020: The Region held a government-to-government Tribal consultation meeting with Petitioner.[15] Attachment RR, Document 877.

- September 18, 2020: Letter from the Region to Petitioner regarding government-to-government Tribal consultation meeting scheduled for October 2, 2020. The Region explained that it began Tribal consultation in November 2015, that permit applications had been pending since January 2013, and that the Region would make final decisions on the permit applications shortly after the 10/2/2020 meeting. The Region also confirmed that it could hold technical meetings requested by Petitioner prior to the 10/2/2020 meeting. Petitioner did not schedule those technical meetings. Attachment SS, Document 878.

- October 21, 2020: Letter from the Region to Petitioner confirming that Petitioner cancelled the October 2, 2020 Tribal consultation meeting. The Region explained that it would shortly make final decisions on the UIC permit applications. Attachment TT, Document 879.

- November 24, 2020: Letter from the Region to 38 Tribal governments, including Petitioner, concluding Tribal consultation, and sharing the EPA *Response to Public*

[15] *See* footnote 13.

Comments document as feedback to explain how Tribal government input was considered in EPA's final actions. Attachment UU, Document 885.

b. The Region followed the *Region 8 Policy*.

The Alliance argues that the Region failed to follow the *Region 8 Policy*, which includes a formal dispute resolution process. Amicus Brief at 5. The relevant provision of that policy states:

> "Region 8 will seek tribal government agreement before making decisions on environmental matters … affecting tribal governments and/or tribal natural resources. If no agreement can be reached, then a formal dispute resolution process can be invoked by either Region 8 or the tribal government."

Attachment Y, Document 963, Bates p. 093555.

Importantly, this dispute resolution process is *permissive*, not *mandatory* ("*can* be invoked") (emphasis added). Thus, the fact that the Region did not invoke the permissive dispute resolution process does not equate to a failure to follow the Policy. Moreover, the dispute resolution process "can be invoked" by the Tribal government, as well. But during the underlying UIC permitting process, no Tribal government invoked it. Perhaps aware of this deficiency, the Alliance argues that EPA failed to inform Petitioner of the dispute resolution process. Amicus Brief at 8. But the *Region 8 Policy* does not require affirmative notification. In any event, the Alliance could have found the *Region 8 Policy* and its dispute resolution provision. An EPA Region 8 website makes the *Region 8 Policy* available to the public.[16]

3. Executive Order 13175, the *Region 8 Policy* and the *EPA Tribal Consultation Policy* are not enforceable.

The amicus brief argues that Executive Order 13175, the *Region 8 Policy* and the *EPA Tribal Consultation Policy* are enforceable pursuant to the APA. The Board need not consider

[16] https://www.epa.gov/tribal/region-8-tribal-affairs-branch

those arguments, though, because the Region acted consistently with the Executive Order and both policies. The Board should follow other federal courts which have declined to review the enforceability of a Tribal consultation policy when the agency complied with its policy. *See, e.g., Hopi Tribe v. U.S. EPA*, 851 F.3d 957, 960 (9th Cir. 2017) ("EPA … consult[ed] with the … Tribe …. Therefore, regardless of the scope of enforceability of any duty to consult on part of the EPA, the EPA surely complied."). EPA takes seriously the Executive Order and the two policies and acts in accordance with them. However, they are not enforceable.

The Executive Order expressly states that it is not enforceable, which courts have confirmed. Attachment W, Document 045, Bates pp. 002530; s*ee, e.g., Sisseton-Wahpeton Oyate of the Lake Traverse Reservation v. United States Corps of Engineers*, No. 3:11-CV-03026-RAL, 2016 WL 5478428, at *10 (D.S.D. Sept. 29, 2016), *aff'd sub nom. Sisseton-Wahpeton Oyate of Lake Traverse Rsrv. v. United States Corps of Engineers*, 888 F.3d 906 (8th Cir. 2018) ("Executive Order [13175] does not create a private right of action") (internal citations omitted).

The *Region 8 Policy* also is not enforceable. First, it is not an enforceable legislative rule. For example, it does not prescribe substantive requirements that affect rights or obligations, but rather contains statements of general policy and recommended agency procedure with respect to consulting with Tribes. Further, it was not created pursuant to specific statutory authority, nor promulgated under the APA's rulemaking provisions. *See, e.g., United States v. Fifty-Three (53) Eclectus Parrots*, 685 F.2d 1131, 1136 (9th Cir. 1982); *Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243 (D.C. Cir. 2014).

Second, the *Region 8 Policy* incorporates an express disclaimer, which supports the conclusion that it is not an enforceable legislative rule, and further distinguishes it from the 8th Circuit cases cited by the Alliance. Attachment Y, Document 963, Bates pp. 093570. In those

cases, the Bureau of Indian Affairs (BIA) did not argue that its consultation policies incorporated disclaimers. *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707 (8th Cir. 1979); *Lower Brule Sioux Tribe v. Deer*, 911 F. Supp. 395 (D.S.D. 1995); *Yankton Sioux Tribe v. Kempthorne*, 442 F. Supp. 2d 774 (D.S.D. 2006). Notably, the Alliance does not inform the Board of more recent 8th Circuit cases holding that Tribal policies with such disclaimers—like the *Region 8 Policy*—are not enforceable. *See, e.g., Sisseton-Wahpeton Oyate*, 2016 WL 5478428, at *10.[17]

The *EPA Tribal Consultation Policy* also is not enforceable.[18] Like the *Region 8 Policy*, it is not an enforceable legislative rule, and is likewise distinguishable from the three 8th Circuit cases cited by the Alliance. In the leading case, BIA failed even to argue that its consultation policy was unenforceable. *Andrus*, 603 F.2d at 718 ("The government does not argue … that the guidelines are not enforceable."). Here, in contrast, EPA contests enforceability of the *EPA Tribal Consultation Policy*. Also, in two of the Alliance's cases, BIA did not consult before making the challenged decisions. *Andrus*, 603 F.2d at 721; *Deer*, 911 F. Supp. at 400. Here, the Region conducted a nearly 5-year consultation process with 38 Tribes.[19]

CONCLUSION

In conclusion, the Petitioner fails to meet the standard of review under 40 C.F.R. § 124.19 for the remaining claims under the NHPA, NEPA, SDWA, and administrative law, and the Board should deny review. Importantly, Petitioner did not demonstrate that the permit

[17] Two other cases cited by the Alliance are inapposite. Neither case involved an APA claim for failure to follow federal agency Tribal consultation policies. *Klamath Tribes v. United States*, 1996 WL 924509, at *8 (D. Or. Oct. 2, 1996) (duty to consult based upon federal government's general trust responsibility to protect treaty resources); *Nez Pierce Tribe v. U.S. Forest Serv.*, 2013 WL 5212317, at *7 (D. Idaho Sept. 12, 2013) (same).

[18] Though not directly relevant to this appeal, EPA notes that it issued a revised Tribal consultation policy in December 2023 that supersedes the *EPA Tribal Consultation Policy* referenced in the amicus brief. *See* https://www.epa.gov/tribal/consultation-tribes#consultation-policy.

[19] Further, none of the Alliance's three cases refers to a disclaimer concerning enforceability. Here, the *EPA Tribal Consultation Policy* expressly implements EO 13175, which as stated above contains a disclaimer.

decisions were based on a clearly erroneous finding of fact or conclusion of law. Several of its arguments failed to meet a minimum level of specificity. Some of the arguments were not raised during the comment period. For those arguments raised in the comment period, Petitioner neglects to confront the Region's responses to comments and explain why the responses were clearly erroneous or otherwise warrant review. Therefore, review of Petitioner's claims should be denied on procedural grounds, or alternatively, on substantive grounds for the reasons set forth herein. Review of the claims raised in the amicus brief should also be denied because of multiple procedural deficiencies. Alternatively, the Board should deny review on substantive grounds. For these reasons, the Board should deny review of the issues raised by Petitioner and the Alliance.

STATEMENT OF COMPLIANCE WITH WORD LIMITATION

In accordance with 40 C.F.R. § 124.19(d)(3), the undersigned attorneys certify that this Response to Petitioner's Motion to Amend Petition for Review does not exceed 14,000 words.

Respectfully submitted,

LUCITA CHIN Digitally signed by LUCITA CHIN Date: 2023.12.22 11:26:33 -07'00'

DATE: December 22, 2023

Lucita Chin
Office of Regional Counsel EPA Region 8
1595 Wynkoop St.
Mail Code: 8ORC-LC-M Denver, CO 80202
(303) 312-7832
chin.lucita@epa.gov

Michael Boydston
Office of Regional Counsel EPA Region 8
1595 Wynkoop St.
Mail Code: 8ORC-LC-G Denver, CO 80202
(303) 312-7103
boydston.michael@epa.gov

Paul Logan
Office of Regional Counsel EPA Region 8
1595 Wynkoop St.
Mail Code: 8ORC-LC-M Denver, CO 80202
(303) 312-6854
logan.paul@epa.gov

Erin Perkins
Office of Regional Counsel EPA Region 8
1595 Wynkoop St.
Mail Code: 8ORC-LC-M Denver, CO 80202
(303) 312-6922
perkins.erin@epa.gov

Of Counsel:
Katie Spidalieri
EPA Office of General Counsel

CERTIFICATE OF SERVICE

I certify that the foregoing EPA REGION 8 RESPONSE TO PETITION FOR REVIEW in the matter of Powertech (USA) Inc., Appeal No. UIC 20- 01, was filed electronically with the Environmental Appeals Board's E-filing System and served by email on the following persons on December 22, 2023.

Attorneys for Petitioner Oglala Sioux Tribe

Jeffrey C. Parsons, Senior Attorney Roger Flynn, Managing Attorney Western Mining Action Project
P.O. Box 349
Lyons, CO 80540
(303) 823-5738
wmap@igc.org

Travis E. Stills Managing Attorney
Energy & Conservation Law
227 E. 14th St., #201
Durango CO 81301
(970) 375-9231
stills@eclawoffice.org

Attorney for Amicus Curiae Great Plains Tribal Water Alliance, Inc.

Peter Capossela, PC Attorney at Law
Post Office Box 10643
Eugene, OR 97440
(541) 505-4883
pcapossela@nu-world.com

Attorneys for Powertech (USA) Inc.

Jason A. Hill
Hunton Andrews Kurth LLP
600 Travis, Suite 4200
Houston, Texas 77002
(713) 220-4510
hillj@huntonak.com

Kerry McGrath
Hunton Andrews Kurth LLP
2200 Pennsylvania Ave. NW
Washington, DC 20037
(202) 955-1519
KMcGrath@huntonak.com

Robert F. Van Voorhees
Robert F Van Voorhees PLLC
155 F Street, N.W., Suite 700
Washington, DC 20004-1357
(202) 365-3277
bob.vanvoorhees@gmail.com

LUCITA CHIN Digitally signed by LUCITA CHIN Date: 2023.12.22 11:27:10 -07'00'

Lucita Chin
Office of Regional Counsel EPA Region 8
chin.lucita@epa.gov