(Slip Opinion)

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

In re Powertech (USA) Inc. Permit Nos. SD31231-00000, SD52173-00000	)	UIC Appeal No. 20-01

[Decided September 3, 2024]

ORDER DENYING REVIEW IN PART AND REMANDING IN PART

Before Environmental Appeals Judges Aaron P. Avila, Wendy L. Blake, and Mary Kay Lynch.

IN RE POWERTECH (USA) INC.

UIC Appeal No. 20-01

ORDER DENYING REVIEW IN PART AND REMANDING IN PART

Decided September 3, 2024

Syllabus

The Oglala Sioux Tribe petitioned the Environmental Appeals Board for review of two Underground Injection Control ("UIC") area permit decisions issued by Region 8 of the U.S. Environmental Protection Agency pursuant to the Safe Drinking Water Act. The area permits authorize Powertech (USA) Inc. to conduct uranium mining operation activities in the Dewey-Burdock in-situ recovery project site located in the Black Hills of South Dakota. The Tribe challenges the permit decisions, claiming that the Region violated the National Historic Preservation Act ("NHPA"), the National Environmental Policy Act ("NEPA"), the Safe Drinking Water Act ("SDWA"), and the Administrative Procedure Act ("APA").

Held: The Board denies review in part and remands the permit decisions in part.

1. On November 16, 2023, the Board issued an order denying review of the NHPA section 106 issue in the petition, and that order is incorporated by reference into this order.

2. The Board denies review of any claims related to NHPA section 110. The issue of compliance with NHPA section 110 was not preserved for Board review as it was not raised with the requisite specificity in comments on the draft permits. Even if the issue had been preserved, the Board would still deny review of the claim because the petition fails to meet the requirements of 40 C.F.R. § 124.19(a)(4)(i), the arguments in the Tribe's reply brief are untimely and the untimely arguments would fail on the merits.

3. The Board denies review of the NEPA claims. The Region considered and addressed the comments the Tribe raised during the public comment period regarding the functional equivalence doctrine and applicability of NEPA to the permit actions at issue here, and the Tribe failed to address the Region's responses or demonstrate that the Region clearly erred or abused its discretion in concluding that EPA's actions with respect to the UIC permits are exempt from NEPA.

4. The Board remands the permit decisions in part. The state of the record prevents us from determining whether the Region exercised considered judgment with respect to the Tribe's comments regarding the administrative record, whether the record is complete and contains all of the materials required by the part 124 regulations, and whether the permit decisions were based on the full record, including comments and attachments thereto received during the public comment period.

Before Environmental Appeals Judges Aaron P. Avila, Wendy L. Blake, and Mary Kay Lynch.

Opinion of the Board by Judge Blake:

I. *STATEMENT OF THE CASE*

The Oglala Sioux Tribe petitioned the Environmental Appeals Board for review of two Underground Injection Control ("UIC") area permit decisions issued pursuant to the Safe Drinking Water Act ("SDWA") by the U.S. Environmental Protection Agency Region 8. The area permits authorize Powertech (USA) Inc. to conduct uranium mining operation activities in the Dewey-Burdock in-situ recovery project site located in the Black Hills of South Dakota.

The petition challenges the UIC permit decisions on various grounds, raising claims under the National Historic Preservation Act ("NHPA"), the National Environmental Policy Act ("NEPA"), the SDWA, and the Administrative Procedure Act ("APA").

After the filing of the petition, at the Region's request, the Board stayed this matter primarily to allow for the resolution of litigation before the United States Court of Appeals for the District of Columbia Circuit involving NHPA compliance issues at the Dewey-Burdock site in *Oglala Sioux Tribe v. U.S. Nuclear Regulatory Commission*, 45 F.4th 291 (D.C. Cir. 2022). That litigation was relevant to this proceeding because the Region had designated the Nuclear Regulatory Commission ("NRC") as the lead federal agency for NHPA section 106 compliance purposes for the Dewey-Burdock project. On November 16, 2023, following the D.C. Circuit's decision rejecting the Tribe's NHPA claims, the Board issued an order in this matter denying review on the NHPA section 106 issue in the petition. In that same order, the Board identified the issues remaining for Board review and

directed the parties to brief those issues: namely, the reference in the petition to NHPA section 110 and the NEPA, SDWA, and APA claims.[1]

For the reasons set forth below, the Board denies review in part and remands the permit decisions in part.

II. *FACTUAL AND PROCEDURAL SUMMARY*

Powertech applied for, and obtained, two UIC area permits, a Class III permit and a Class V permit, that authorize Powertech to engage in underground injection activities necessary for the in-situ recovery of uranium at the Dewey-Burdock project site.[2] The project site consists of approximately 10,580 acres located in the southern Black Hills in South Dakota on the South Dakota-Wyoming state line. *See* Region 8, U.S. EPA, *Response to Public Comments Class III Area Permit No. SD31231-00000, Aquifer Exemption Decision and Class V Area Permit No. SD52173-00000*, at 1, 310 (Nov. 24, 2020) (A.R. 1) ("Resp. to Cmts."); *see also Fact Sheet Powertech (USA) Inc., Dewey-Burdock Class III Injection Wells, Custer and Fall River Counties, South Dakota, EPA Permit No. SD31231-00000*, at 10 (Aug. 26, 2019) (A.R. 171) ("2019 Fact Sheet").

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[1] The Board incorporates by reference into this order its November 2023 order denying the NHPA section 106 claim and identifying the remaining issues 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 at 30 n.27 (Nov. 16, 2023) ("Board's Nov. 2023 Order").

[2] Congress established the UIC program pursuant to the SDWA and required EPA to promulgate regulations for UIC programs to protect underground sources of drinking water. SDWA § 1421, 42 U.S.C. § 300h. EPA has promulgated such regulations, including minimum requirements for UIC permits. *See* 40 C.F.R. pts. 144-148. The SDWA's UIC permit program regulates underground injection by six classes of wells. 40 C.F.R. §§ 144.1(g), .6; 146.5. As explained in the text above, the UIC permitted wells at issue here will be used for in-situ recovery of uranium. In-situ recovery is one of two methods currently used to obtain uranium from underground ore deposits. *See* U.S. Nuclear Regul. Comm'n, *In Situ Recovery Facilities*, https://www.nrc.gov/materials/uranium-recovery/extraction-methods/isl-recovery-facilities.html (last visited Sept. 3, 2024).

The uranium recovery process at Powertech's site will involve introducing a solution known as lixiviant into the subsurface uranium ore deposits, via the Class III injection wells, to leach the uranium from the ore. 2019 Fact Sheet at 14. Liquid waste generated from this process will be treated and disposed of by injection into the Class V injection wells, or by land application. *Id*.

The work Powertech seeks to perform at the Dewey-Burdock project site requires approvals by state and federal agencies, including the two UIC area permits at issue in this matter and a source material license from the NRC.

A. *The Permit Applications and Proceedings Leading Up to Issuance of the UIC Area Permits*

Powertech submitted the initial Class III area permit application in December 2008 and Class V area permit application in March 2010. *See* Letter from Richard C. Clement, President & CEO, Powertech (USA) Inc., to Sadie Hoskie, Dir., Water Program, Region 8, U.S. EPA at 2 (Feb. 3, 2014) (A.R. 673) ("Powertech Letter") (summarizing history of permit applications). Thereafter, in 2012, Powertech revised the Class III permit application for consistency with the NRC license application and, in 2013, updated the Class III permit application in response to questions from the Region. *Id*.; Powertech (USA) Inc., *Dewey-Burdock Project Class III Underground Injection Control Permit Application* (Jan. 2013 updated) (A.R. 238). Powertech also revised the Class V permit application in 2012, addressing questions from the Region. Powertech Letter at 2; Powertech (USA) Inc., *UIC Permit Application Class V Non-Hazardous Injection Wells, Dewey-Burdock Project, Custer and Fall River Counties, South Dakota* (Jan. 2012 revised) (A.R. 294).

After receipt of Powertech's 2013 revised Class III permit application, the Region initiated outreach to the community and tribes.[3] *See* Resp. to Cmts. at 241-43 (Cmt. # 200), 298-303 tbl.1 (listing outreach efforts), 304 (Cmt. # 254). In 2017, the Region announced its proposal to issue two UIC area permits to Powertech and made the draft permits and supporting materials available for public comment. *See, e.g.*, Region 8, U.S. EPA, *News Release, EPA Seeks Public Comment on Draft Permits and Aquifer Exemption for Uranium Mining Project in*

[3] For instance, the Region sent letters to federally recognized tribes offering tribal consultation meetings on the proposed project and held individual tribal consultation meetings with the tribes that expressed interest. *See* Resp. to Cmts. at 241 n.3 (Cmt. # 200), 298 tbl.1, 304 (Cmt. # 254).

Southwestern South Dakota (Mar. 3, 2017) (A.R. 175); 2019 Fact Sheet at 7; Resp. to Cmts. at 1-2. This public comment period, which the Region extended once in response to a request for extension, remained open for over 100 days. *See* 2019 Fact Sheet at 7; Resp. to Cmts. at 2. The Region also offered further opportunities for consultation on the draft UIC permits and supporting draft documents. *See* Resp. to Cmts. at 242 (Cmt. # 200).

The Region received numerous comments on the draft permits, including comments from the Oglala Sioux Tribe. *See* Region 8, U.S. EPA, *Certified Index of Administrative Record* at 30-36 (Dec. 20, 2023) (listing 2017 public comments at document numbers 581 through 659); Oglala Sioux Tribe, *Comments and Attachments Opposing the Dewey-Burdock Project* (2017) (A.R. 644) ("Tribe's Comments on 2017 Draft Permits"). After reviewing public comments on the 2017 draft permits and considering the input received during tribal consultation meetings, the Region revised the draft UIC permits and supporting documents and sought additional public input in 2019. Resp. to Cmts. at 242 (Cmt. # 200); *see* Region 8, U.S. EPA, *Public Notice: EPA Dewey-Burdock Class III and Class V Well Draft Area Permits* (Aug. 26, 2019) (A.R. 194); 2019 Fact Sheet at 8. The Region also offered to hold further tribal consultation meetings concerning the 2019 draft permits and supporting documents. Resp. to Cmts. at 2, 242.

Like the 2017 comment period, the public comment period on the 2019 revised draft permits was extended once in response to a request and remained open for over 100 days. *Id*. at 230 (Cmt. # 181). The Region received several comments on the revised draft documents, including comments from the Oglala Sioux Tribe. *See* Region 8, U.S. EPA, *Certified Index of Administrative Record* at 29-30 (Dec. 20, 2023) (A.R. 574-580) (comments on 2019 draft permits); Oglala Sioux Tribe, *Comments from the Oglala Sioux Tribe Submitted During the 2019 Public Comment Period Opposing the Dewey-Burdock Project* (Dec. 9, 2019) (A.R. 868) ("Tribe's Comments on 2019 Draft Permit"). During and after this public comment period, the Region continued to offer consultation opportunities to the tribes on the revised draft permits. *See* Resp. to Cmts. at 242, 301-03 tbl.1. The Region issued the final UIC area permits in November 2020.

B. *The Final Permit Decisions*

The Class III area permit authorizes the construction and operation of injection wells in fourteen wellfields located within the permit area. Region 8, U.S. EPA, *Underground Injection Control Final Class III Area Permit, Area Permit No. SD31231-00000, Dewey Burdock Uranium In-Situ Recovery Project, Custer and Fall River Counties, South Dakota, Issued to Powertech (USA) Inc*. at 1 (Nov. 24, 2020) (A.R. 109) ("Final Class III Permit"); 2019 Fact Sheet at 7.

Injection activities, however, are prohibited until such time as Powertech obtains a written authorization from the Region to commence injection. *See* Final Class III Permit pt. II at 6-23. The permit requires Powertech to perform a series of activities before obtaining authorization to inject. *Id*.; *see also* 40 C.F.R. § 146.34(b).[4] The permit also requires Powertech to halt all ground-disturbing activities within 150 feet of the area of discovery "[i]f a previously unknown cultural resource is discovered during the implementation of the Project." Final Class III Permit pt. XIV.A.4, at 81-82.

The Class V permit authorizes the construction and operation of up to four deep injection wells to dispose of in-situ recovery process waste fluids. Region 8, U.S. EPA, *Underground Injection Control Final Class V Area Permit, Area Permit No. SD52173-00000, Dewey Burdock Uranium In-Situ Recovery Project, Custer and Fall River Counties, South Dakota, Issued to Powertech (USA) Inc*. at 1 (Nov. 24, 2020) (A.R. 281) ("Final Class V Permit"). Injection is authorized only into the Minnelusa Formation and within the parameters and conditions established in the Class V area permit. *Id.*

C. *The Petition for Review and Proceedings Post-Permit Issuance*

The Tribe filed a petition seeking Board review of the permit decisions. *See* Oglala Sioux Tribe, Petition for Review (Dec. 24, 2020) ("Pet."). The petition states that the land on which mining operations will take place is of historical and cultural significance to the Tribe and claims that the Region failed to demonstrate compliance with: (1) the NHPA and its implementing regulations, (2) the

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[4] UIC permits are designed as multi-phase permits: (1) pre-operation, (2) operation, and (3) plugging and abandonment. *See* Water Programs: Consolidated Permit Regulations and Technical Criteria and Standards, 45 Fed. Reg. 42,472, 42,478 (Jun. 24, 1980); *see, generally*, 40 C.F.R. pt. 144 (Underground Injection Control Program). As such, the UIC regulatory scheme is set up so that the permit applicant provides certain information to the permitting authority before a permit is issued, after permit issuance but prior to operation, and during and after operation. *See, e.g.*, 40 C.F.R. § 144.31(e) (specifying information a permit applicant must submit with its application); *id*. § 146.34(a) (specifying information the permit issuer must consider before issuing a permit); *id*. § 146.34(b) (specifying information the permit issuer must consider before authorizing a permittee to operate UIC wells); *id*. § 146.34(c) (specifying information the permit issuer must consider prior to granting approval for the plugging and abandonment of the wells).

"functional equivalence standard for NEPA," (3) the SDWA and its implementing regulations, and (4) the APA. *See* Pet. at 8-10, 14, 23, 34, 45.[5]

With respect to the NHPA, the Tribe argued that the Region had not met its NHPA section 106 obligations because "there has never been a competent Lakota cultural resources survey of the Dewey-Burdock site," Pet. at 16, and the Region could not rely on the NRC's "efforts with regard to identification of cultural resources," *id.* at 20. As noted in Part I, above, the Board denied review of this issue. 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 at 20-29 (Nov. 16, 2023) ("Board's Nov. 2023 Order"). The petition also contains a passing reference to NHPA section 110, which, for purposes of this decision, we refer to as the Tribe's NHPA section 110 claim. Pet. at 22. With respect to its NEPA claims, the Tribe argues that 40 C.F.R. § 129.9(b)(6) "does not excuse" consideration of the factors in 40 C.F.R. § 144.33(c)(3), "that [under section 144.33(c)(3)] the agency must evaluate '[t]he cumulative effects of drilling and operation of additional injection wells,'" that the Region did not "adequately analyze[] the cumulative effects of the granting of the * * * area permits," and therefore the Region did not satisfy "NEPA's cumulative effects standard." *Id.* at 25-26. The Tribe further adds that "issuance of the UIC permits violates the basic NEPA premise that compliance with the 'hard look' mandate must occur before, not after, permitting," *id*. at 31, and that "NEPA violations flow from issuing the UIC permits in reliance on nebulous commitments and requirements of other permitting, without providing an orderly consideration of diverse environmental factors related to other EPA permitting duties," *id*. at 32.[6] With respect to the SDWA, the petition argues, among other things, that the Region

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[5] The Great Plains Tribal Water Alliance, Inc. filed an amicus brief, claiming, among other things, that the Region "violated Executive Order 13175 and Agency consultation policies." Brief Amicus Curiae of the Great Plains Tribal Water Alliance, Inc. in Support of the Petition for Review of the Oglala Sioux Tribe at 6 (Jan. 14, 2021). The Board declines to adjudicate the arguments made by amicus, as the arguments are outside the scope of the petition. *See In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 595 (EAB 2006) (declining review of new issues raised by amici that could have been raised in a timely appeal).

[6] The "hard look mandate" refers to the analysis federal agencies are expected to undertake under NEPA. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (stating that NEPA "require[s] that agencies take a 'hard look' at environmental consequences") (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)).

failed to comply with 40 C.F.R. §§ 144.33(c)(3) and 144.12(a), claiming that the baseline groundwater data Powertech provided is inadequate and the cumulative effects and hydrogeological analyses the Region conducted are deficient. *Id*. at 34-45. Finally, with respect to the APA, the petition contends that the Region engaged in de facto rulemaking and omitted documents from the administrative record. *Id*. at 45-52.

The parties completed briefing in late January 2024. In early February 2024, the Region filed a motion to strike and alternative motion for leave to file surreply, to which the Tribe and Powertech each filed a response. The Board held oral argument in March 2023. Oral Argument Transcript (Mar. 14, 2024) ("Oral Arg. Tr.").

III. *PRINCIPLES GOVERNING BOARD REVIEW*

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

In any appeal from a permit decision issued under part 124, the petitioner bears the burden of demonstrating that review is warranted. *See* 40 C.F.R. § 124.19(a)(4). In considering an appeal, the Board first evaluates whether the petitioner has met threshold procedural requirements, including, among other things, whether an issue has been preserved for Board review. *See* 40 C.F.R. §§ 124.13, 124.19(a)(2)-(4); *see also In re Penneco Envtl. Sols., LLC*, 17 E.A.D. 604, 617-18 (EAB 2018); *In re Seneca Res. Corp.*, 16 E.A.D. 411, 412 (EAB 2014).

The Board has discretion to grant or deny review of a permit decision. 40 C.F.R. § 124.19; *see In re Avenal Power Ctr., LLC*, 15 E.A.D. 384, 394 (EAB 2011); *In re Archer Daniels Midland Co*., 17 E.A.D. 380, 382-83 (EAB 2017). The petitioner must demonstrate that the permit decision is based on a clearly erroneous finding of fact or conclusion of law or involves an exercise of discretion that warrants review under the law. 40 C.F.R. § 124.19(a)(4)(i)(A)-(B); *see, e.g.*, *In re La Paloma Energy Ctr., LLC*, 16 E.A.D. 267, 269 (EAB 2014).

"When evaluating a challenged permit decision for clear error, the Board examines the administrative record that serves as the basis for the permit to determine whether the permit issuer exercised 'considered judgment.'" *In re City of Lowell*, 18 E.A.D. 115, 132 (EAB 2020) (citing *In re Gen. Elec. Co.*, 17 E.A.D.

434, 560-61 (EAB 2018)); *see In re Ash Grove Cement Co*., 7 E.A.D. 387, 417-18 (EAB 1997). The permit issuer must articulate with reasonable clarity the reasons supporting its conclusion and the significance of the crucial facts it relied on when reaching its conclusion. *E.g., In re Shell Offshore, Inc.*, 13 E.A.D. 357, 391 (EAB 2007). As a whole, the record must demonstrate that the permit issuer "duly considered the issues raised in the comments" and ultimately adopted an approach that "is rational in light of all information in the record." *In re Gov't of D.C. Mun. Separate Storm Sewer Sys*., 10 E.A.D. 323, 342 (EAB 2002); *see In re NE Hub Partners, LP*, 7 E.A.D. 561, 568 (EAB 1998), *pet. for review denied sub nom. Penn. Fuel Gas, Inc. v. EPA*, 185 F.3d 862 (3d Cir. 1999).

IV. *ANALYSIS*

According to the Tribe, the Region violated section 110 of the NHPA and failed to comply with the NEPA, SDWA, and APA. The Region and Powertech disagree.

For the reasons set forth below, the Board denies review of any claims related to NHPA section 110 and NEPA in the petition. The Board remands the permit decisions, in part, as the state of the record prevents us from determining whether the Region exercised considered judgment with respect to the Tribe's comments regarding the administrative record, whether the record is complete and contains all of the materials required by the part 124 regulations, and whether the permit decisions were based on the full record, including comments and attachments thereto received during the public comment period. In light of this issue, the Board is unable to decide the remaining SDWA and APA claims.

A. *The NHPA Section 110 Claim*

In our November 2023 order denying review of the NHPA section 106 claim that the Tribe raised in its petition, we stated, "It is not clear on the face of the petition whether the Tribe is asserting that the Region violated NHPA section 110, or how, in fact [the Region] violated that section." Board's Nov. 2023 Order at 29 n.25. We directed the parties to brief the NHPA section 110 matter and reminded the Tribe "that new arguments cannot be raised in a reply" brief. *Id*.

The Region and Powertech address the NHPA section 110 claim in their responses to the petition requesting that the Board deny review. The Tribe's reply brief argues that the Region had procedural obligations under section 110 that the Region ignored and an obligation to conduct a cultural resources survey. *See* Reply to Region 8 and Powertech Responses to Petition for Review 7-9 (Jan. 22, 2024) ("Tribe's Reply Br.").

As we explain more fully below, the issue of compliance with NHPA section 110 was not preserved for review because comments on the draft permit did not raise the issue with the requisite level of specificity. Even if this issue had been preserved, the Board would still deny review of the claim because the petition fails to meet the requirements of 40 C.F.R. § 124.19(a)(4)(i), the Tribe's NHPA section 110 arguments in its reply brief are untimely, and the untimely arguments would fail on the merits.

1. *The Tribe's Comments Lack the Requisite Specificity*

The part 124 regulations require persons who believe that a condition or draft permit decision is inappropriate to "raise all reasonably ascertainable issues" and "submit all reasonably available arguments supporting their position by the close of the public comment period" on the draft permit. 40 C.F.R. § 124.13. The Board has held that "in order for an issue to be reviewed on appeal it must have been raised with a reasonable degree of specificity and clarity during the public comment period" to enable "a full and meaningful response to comments" by the permit issuer. *In re Westborough*, 10 E.A.D. 297, 304 (EAB 2002); *see City of Lowell*, 18 E.A.D. at 131 ("a petitioner must demonstrate that any issues and arguments it raises on appeal have been preserved for Board review by being raised with 'a reasonable degree of specificity and clarity' during the public comment period or public hearing"). Permit issuers "are not expected to be prescient in their understanding of vague or imprecise comments;" rather, "commenters must present issues with sufficient specificity to apprise the permit issuing authority of the issues being raised." *In re Sutter Power Plant*, 8 E.A.D. 680, 694 (EAB 1999) (quoting *In re Rockgen Energy Ctr*., 8 E.A.D. 536, 547-48 (EAB 1999)); *see also In re Gen. Elec.*, 18 E.A.D. 575, 637 (EAB 2022) ("[P]ermit issuers need not 'guess the meaning behind imprecise comments' and are 'under no obligation to speculate about possible concerns that were not articulated in the comments.'") (citing *In re Scituate Wastewater Treatment Plant*, 12 E.A.D. 708, 723 (EAB 2006)). Consistent with these principles, the Board has found that arguments were not preserved for review when comments lacked clarity or specificity. *See, e.g., City of Lowell*, 18 E.A.D. at 191 n.45 (finding argument raised during public comment period lacked sufficient clarity to enable a meaningful response when regulation at stake in petition was not cited in comments); *In re Puerto Rico Elec. Power Auth.*, 6 E.A.D. 253, 256 n.3 (EAB 1995) (denying review of constitutional claims that were referenced only vaguely, if at all, during the public comment period).

According to the Tribe, it "squarely raised the issue of noncompliance with Section 110." Tribe's Reply Br. at 8-9. We disagree. The Tribe's comments stated: "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." Tribe's Comments on 2019 Draft Permits at 8.

The comments provide nothing more than a vague, conclusory reference to NHPA section 110, and are devoid of any discussion of which aspects of section 110 the Region allegedly violated or how the Region allegedly failed to meet such section 110 obligations. The Tribe's comments fail to apprise the Region of the section 110 issue being raised. NHPA section 110 contains thirteen subsections that vary in nature and cover an array of topics including, for example, management and transfer of agency-owned historic properties, establishment of historic preservation programs and officials, requirements for projects taking place at national historic landmarks, and the establishment of an annual preservation awards program. *See* 54 U.S.C. §§ 306101–306107, 306109–306114. It is not incumbent upon the Region to guess which of these provisions the Tribe believes is of relevance here or to speculate about possible concerns the Tribe might have regarding compliance with these provisions that the Tribe does not articulate. The Tribe's NHPA section 110 claim fails because it was not raised with sufficient specificity in public comments to preserve it for review.[7] We therefore deny review of the Tribe's NHPA section 110 claim.

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[7] In responding to arguments in the Region's and Powertech's response briefs, the Tribe attempts to minimize the importance of raising comments with sufficient specificity. Tribe's Reply Br. at 9. The Tribe cites *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 899 (9th Cir. 2002), as support for its claim that "[n]o further elaboration was needed to alert the Region of its duty" to address NHPA section 110. *Id*. This argument ignores 40 C.F.R. § 124.13 and Board precedent on specificity. The specificity requirement is not an "arbitrary hurdle;" it "serves important purposes such as 'ensur[ing] that the permit issuer has the first opportunity to correct any potential problems in the draft permit'" and to respond to those issues prior to finalization of the permit. *In re Gen. Elec.,* 18 E.A.D. at 636 (citing *In re Gen. Elec*., 17 E.A.D. 434, 583 (EAB 2018)), *pet. for review denied sub nom. Housatonic River Initiative v. EPA*, No. 22-1398 (1st Cir. Jul. 25, 2023). Moreover, *Dombeck* is inapposite. In *Dombeck*, the plaintiffs raised the issue of whether the Forest Service complied with the National Forest Management Act "in amending the Forest Plan road density standards," and the Forest Service understood the comments well enough that it responded and explained how its actions were consistent with the statute. 304 F.3d at 899. By contrast, here the Tribe made a vague statement about NHPA section 110 that did not identify any specific requirement that the Region failed to meet. *See* Tribe's Comments on 2019 Draft Permits at 8. The Region understandably did not address

2. *The Petition Fails to Meet the Requirements of Section 124.19(a)(4)(i)*

The petition reiterates, almost verbatim, the comments the Tribe raised on the draft permits. It states, "In addition to Section 106 NHPA duties, NHPA Section 110 also ensures proper identification and evaluation of cultural resources," and "[t]hese duties extend beyond those imposed by the Section 106 consultation process and cannot be satisfied by mere outreach letters." Pet. at 22.

The regulations governing permit appeals require that issues raised on appeal be articulated with sufficient specificity. "[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). As the Board has consistently held, to meet this requirement "it is not enough for a petitioner to merely cite or reiterate comments previously submitted on the draft permit." *In re Ariz. Pub. Serv.*, 18 E.A.D. 245, 251 (EAB 2020) (citing *In re City of Taunton Dep't of Pub. Works*, 17 E.A.D. 105, 111 (EAB 2016), *aff'd*, 895 F.3d 120 (1st Cir. 2018), *cert. denied*, 139 S. Ct. 1240 (2019)).

The Tribe's petition fails to satisfy the threshold requirements for review under 40 C.F.R. § 124.19(a)(4)(i) as it merely repeats comments submitted on the draft permit, does not present a specific challenge to the permit decisions, and does not clearly set forth with factual and legal support the basis under NHPA section 110 as to why the permit decisions should be reviewed. *See, e.g.*, *City of Lowell*, 18 E.A.D. at 179-180 (rejecting claim under the Clean Water Act because petitioners' contentions were vague and unclear); *Beeland Group*, 14 E.A.D. at 205 (noting that lack of requisite specificity in petition was fatal); *In re City of Moscow*, 10 E.A.D. 135, 172 (EAB 2001) (noting that "mere allegations of error" are not enough to warrant review and rejecting vague and unsubstantiated claims). Therefore, even if the section 110 claim had been preserved for review, the Board would deny review for failure to meet the requirements of 40 C.F.R. § 124.19(a)(4)(i).[8]

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in its response to comments document the Tribe's reference to NHPA section 110 in the Tribe's comments, as the comments failed to apprise the Region of the Tribe's specific challenge.

[8] In its reply brief, the Tribe claims that it did not have to elaborate further in its comments and petition because it pointed "to the undisputed fact that there has *never* been a competent Lakota cultural resources survey conducted on the Dewey-Burdock site."

3. *The Tribe Raises Arguments in Its Reply Brief that Are Untimely and Without Merit*

In its reply brief, the Tribe attempts for the first time to explain its NHPA section 110 claim. The Tribe does not identify a provision of NHPA section 110 that the Region allegedly violated, instead it cites federal cases for the proposition that section 110 creates "procedural requirements for the protection of historic and cultural resources" and requires an agency to comply with that section "to the fullest extent possible."[9] Tribe's Reply Br. at 7-9 (citing *Recent Past Pres. Network v. Latschar*, No. CIV.A. No. 06-2077 TFH AK, 2009 WL 6325768, at *7 (D.D.C. Mar. 23, 2009); *Oglala Sioux Tribe v. U.S. Army Corps of Eng'rs*, 537 F. Supp.2d 161, 173 (D.D.C. 2008); and *Nat'l Trust for Historic Pres. v. Blanck*, 938 F. Supp. 908, 925 (D.D.C. 1996)). According to the Tribe, the Region did not comply with section 110 "to the fullest extent possible" because it failed to conduct a cultural resources survey on the site. *Id*. It adds that a section 110 violation is demonstrated by the Region's adoption of the NRC's NHPA process, "which was limited to NHPA duties involving NRC control and authority," *id*. at 8, and that the "lack of a competent survey fatally undermines the Programmatic Agreement," *id*. at 9. These arguments are untimely. *See* 40 C.F.R. § 124.19(c)(2) (a "[p]etitioner may not raise new issues or arguments in the reply [brief]"). The Tribe could have raised them in its petition but failed to do so. *See, e.g.*, *In re City of Keene*, 18 E.A.D. 720, 747, 754, 760 (EAB 2022) (declining to review issues that could have been raised in petition but were not and were raised for the first time in the reply brief).

Not only are these arguments untimely, and will not be considered for that reason alone, they are also without merit. The Tribe's assertions about the adequacy of the Programmatic Agreement, the alleged lack of a competent cultural

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Tribe's Reply Br. at 9. This argument is unavailing. The Tribe's comments on the draft permits and its arguments in the petition about the lack of a "competent Lakota cultural resources survey" for the project site were made in the NHPA section 106 context, not section 110. *See* Tribe's Comments on 2019 Draft Permits at 37-38; Pet. at 14-16, 20-21. As such, they failed to alert the Region of the section 110 claim. And, as discussed in Part IV.A.3, below, the NHPA section 106 claim, which included the issue of the cultural resources survey, was resolved in our November 2023 order. *See* Board's Nov. 2023 Order at 22-29.

[9] At oral argument, when asked "what specific statutory provision impose[s] a requirement that the Region allegedly did not meet," the Tribe did not identify a provision. Oral Arg. Tr. at 13-14. Instead, the Tribe stated that section 110 "is like an exclamation point on the consultation duties." *Id*. at 14.

resources survey, and the Region's designation of the NRC as lead federal agency are nothing more than an attempt to relitigate the NHPA section 106 arguments that the Board has already rejected. Our November 2023 order conclusively resolved these issues, *see* Board's Nov. 2023 Order at 22-29, and we decline the Tribe's attempt to relitigate these issues by recasting them under a different provision. The Tribe cannot breathe new life into its NHPA section 106 claims by simply placing a new label on them, without tying the claims to specific provisions of section 110 that the Region allegedly violated. The Tribe has failed to do that here.

Moreover, the cases upon which the Tribe relies do not support its position. Those cases addressed claims involving alleged violations of NHPA § 110(a)(1) (property owned or controlled by a federal agency) and/or NHPA § 110(a)(2) (requirements for a federal agency's historic preservation program).[10] The petition before us involves neither of these provisions nor does it identify procedural obligations the Region failed to satisfy under section 110.[11] Instead, the cases on which the Tribe relies state that section 110 "is intended to be read in conjunction with Section 106, which constitutes the main thrust of the NHPA," *Latschar*, 2009 WL 6325768, at *7, and that section 110 "does not affirmatively mandate the preservation of historic buildings or other resources," *U.S. Army Corps of Eng'rs*, 537 F. Supp.2d at 173 (emphasis omitted). The *Blanck* court stated that section 110 "represents an elucidation and extension of the Section 106 process but not its replacement by new and independent substantive obligations of a different kind," 938 F. Supp. at 920, and that section 110 "cannot be read to create new substantive preservationist obligations separate and apart from the overwhelmingly procedural thrust of the NHPA," *id*. at 922. *See also id*. at 925 (stating that section 110 "does not require anything more" since its addition to the statute "was not intended to expand the preservationist responsibilities of federal agencies beyond what the

[10] For instance, while the *Latschar* court stated that section 110 creates procedural requirements that are separate and distinct from section 106, this statement was made in the context of evaluating alleged violations under sections 110(a)(1) and 110(a)(2). *Latschar* at *7. Similarly, *Blanck* and *U.S. Army Corps of Eng'rs* involved alleged violations under section 110(a). Section 110(a)(1) requires heads of federal agencies to assume responsibility for the preservation of historic property that is owned or controlled by the agency, and section 110(a)(2) requires each agency to establish a preservation program. 54 U.S.C. §§ 306101-306102.

[11] To the extent the Tribe attempts to assert that section 110 requires a consultation process separate from NHPA section 106, the petition did not articulate such a claim, and the cases the Tribe cites in its reply brief do not support such a claim.

NHPA already required."). As noted above, the Board has already found that the Region complied with NHPA section 106, *see* Board's Nov. 2023 Order at 24, and the Tribe's reply brief does not demonstrate that the Region had an obligation to conduct a cultural resources survey independent from the efforts taken under section 106.[12] In addition, as noted in the Board's November 2023 order, the D.C. Circuit has held that an agency can satisfy its NHPA obligations "without conducting a survey or conducting it in a specific way." Board's Nov. 2023 Order at 23-24 (quoting *Oglala Sioux Tribe v. U.S. Nuclear Regul. Comm'n*, 45 F.4th 291, 306 (D.C. Cir. 2022)).

Accordingly, the Board denies review of the Tribe's NHPA section 110 claim in the petition.

B. *The NEPA Claims*

Notwithstanding established federal court and Board precedent concluding that the SDWA and the UIC permitting program are the functional equivalent of NEPA, and EPA regulations exempting UIC permits from the procedural requirements of NEPA, the Tribe alleges that the Region failed to satisfy NEPA's "cumulative effects standard" and "hard look" mandate. Pet. at 25-26, 31-32. The Tribe also alleges that "the Region's permitting process failed to achieve 'functional equivalence' to NEPA's duties." Tribe's Reply Br. at 10. The Region and Powertech argue that the Board should deny the Tribe's NEPA-related claims. EPA Region 8's Response to Petition for Review 9 (Dec. 22, 2023) ("Reg.'s Resp. Br."); Response of Powertech (USA) Inc. to Petition for Review 6-7 (Dec. 22, 2023) ("Powertech's Resp. Br."). The Region states that "Petitioner obfuscates the requirements of functional equivalence by referring to NEPA requirements." Reg.'s Resp. Br. at 9. We agree and deny review of the NEPA claims. The Region considered and addressed the Tribe's comments regarding the functional equivalence doctrine and applicability of NEPA to the permit actions at issue here,

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[12] The Tribe also argues that "the Region's deliberate and unlawful reliance on an incompetent cultural resources survey to dismiss Section 110 duties, result[ed in] uninformed decisionmaking, and failure to provide the Tribe a meaningful opportunity to identify, evaluate, or mitigate impacts to its cultural resources." Tribe's Reply Br. at 10. As noted above, the Tribe has not demonstrated that the Region was required under section 110 to conduct a cultural resources survey. We note, however, that concerns about the identification, evaluation, and protection of cultural resources in the project site are addressed by the Class III area permit. The permit requires Powertech to protect any previously unknown cultural resources discovered during implementation of the project. Final Class III Permit pt. XIV.A.4, at 81-82.

and the Tribe failed to address the Region's responses or demonstrate that the Region clearly erred or abused its discretion in concluding that EPA's actions with respect to the UIC permits are exempt from NEPA.

1. *The Petition Does Not Address the Region's Response to Comments and the Tribe Raises Arguments in Its Reply Brief that Are Untimely*

In responding to the Tribe's comments, the Region explained that "[c]ourts 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." Resp. to Cmts. at 314 (Cmt. # 264) (quoting *In re Am. Soda, LLP*, 9 E.A.D. 280, 290 (EAB 2000)). The functional equivalence doctrine provides 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 issues, then formal compliance with NEPA is not necessary, [and] functional compliance [is] * * * sufficient." *Am. Soda*, 9 E.A.D. at 290-91 (alteration in original) (quoting *Warren Cnty. v. North Carolina*, 528 F. Supp. 276, 286 (E.D.N.C. 1981)); *see* Resp. to Cmts. at 314. To show functional equivalence, "EPA need not demonstrate that it has addressed all five elements of an [Environmental Impact Statement] as set forth in NEPA." *Am. Soda*, 9 E.A.D. at 291. Rather, as noted above, "NEPA is fulfilled where the federal action has been taken by an agency with recognized environmental expertise and whose procedures ensure extensive consideration of environmental concerns, public participation, and judicial review." *Id.* (quoting *In re Chem. Waste Mgmt., Inc*., 2 E.A.D. 575, 578 (*Adm'r* 1988), *aff'd mem. sub nom. State of Alabama ex rel. Siegelman v. EPA*, 911 F.2d 499 (11th Cir. 1990)).

The Region further explained in its response to comments that applying this well-settled doctrine "courts have exempted certain EPA actions from the procedural requirements of NEPA," including actions under the SDWA, finding that EPA actions under these statutes "are functionally equivalent to the analysis required under NEPA" as "they are undertaken with full consideration of environmental impacts and opportunities for public involvement." Resp. to Cmts. at 313 (Cmt. # 264) (citing 72 Fed. Reg. 53,652, 53,654 (Sept. 19, 2007) and federal court precedent recognizing the functional equivalence doctrine). For instance, the Region noted that the United States Court of Appeals for the Eighth Circuit found in *Western Nebraska Resources Council v. U.S. EPA*, 943 F.2d 867 (8th Cir. 1991), that "the SDWA is the functional equivalent of NEPA and therefore formal NEPA compliance is not required by EPA when the Agency takes action pursuant to the SDWA." *Id*. The Region also cited Board case law explaining that the "[p]art 124 permitting regulations codify the functional equivalence doctrine and exempt UIC

permit actions from NEPA's environmental impact statement requirement," and that "40 C.F.R. § 124.9(b)(6) is 'dispositive on the question of the UIC permit program's functional equivalence to NEPA.'" *Id.* at 315 (citing Board caselaw). In light of the above, the Region concluded that EPA's actions with respect to the UIC permits at issue here "are exempt from NEPA" under the functional equivalence doctrine, relevant caselaw, and 40 C.F.R. § 124.9(b)(6), and EPA therefore need not complete a formal NEPA analysis prior to issuing the UIC permits. *Id*. The Region added that it "conducted an extensive public process, including tribal consultation, * * * and considered the environmental impacts of the UIC permits." *Id*.

The Tribe's petition simply repeats the Tribe's comments regarding NEPA and does not address the Region's response to such comments and the long-standing federal and Board precedent cited therein providing that the SDWA and UIC permitting program are the functional equivalent of NEPA. *Compare* Tribe's Comments on 2019 Draft Permit at 3, 27-28, 31-35, *with* Pet. at 23-31. It is not enough for a petitioner to repeat comments previously submitted on a draft permit—a petitioner must substantively address the permit issuer's response to previous objections and show that the response was clearly erroneous. *See, e.g.*, *In re City of Taunton Dep't of Pub. Works*, 17 E.A.D. 105, 110-11 & n.1, (EAB 2016), *aff'd*, 895 F.3d 120 (1st Cir. 2018), *cert. denied*, 139 S. Ct. 1240 (2019). The Tribe's petition has not done so here, and that failure is fatal. *See, e.g.*, *In re Panoche Energy Ctr., LLC*, 18 E.A.D. 818, 847 (EAB 2023), *pet. for review denied*, No. 23-1268, 2024 U.S. App. LEXIS 14757 (9th Cir. June 18, 2024).

In its reply brief, the Tribe contends for the first time that it did not have to address in its petition the caselaw the Region cited in the response to comments because the case law "is inapposite and irrelevant to application of the functional equivalence doctrine," that the functional equivalence doctrine cannot exempt EPA from NEPA compliance, and that a "functional equivalence test" needs to be performed when the Region "does not use the formal tool of an [Environmental Impact Statement]." Tribe's Reply Br. at 11-12, 14. But, as noted earlier in this decision, a petitioner may not raise new arguments in a reply brief. 40 C.F.R. § 124.19(c)(2); *City of Keene*, 18 E.A.D. at 747, 754, 760. We therefore reject the Tribe's untimely arguments.

For the above reasons, the Board denies the NEPA claims on procedural grounds.

2. *The Tribe's Arguments Do Not Demonstrate Clear Error or Abuse of Discretion*

Even if we were to consider the Tribe's arguments on the merits, the Tribe has not demonstrated that the Region clearly erred or abused its discretion by determining that the UIC permits "are exempt from NEPA." *See* Resp. to Cmts. at 315 (Cmt. # 264). The case law cited in the Region's response to comments is directly on point. As the response to comments correctly explained, it is well settled that the SDWA and the UIC permitting program are the functional equivalent of NEPA, and § 124.9(b)(6) is dispositive on the question of the UIC permit program's functional equivalence to NEPA. In light of this, in issuing the UIC permits at issue here, the Region needed only to ensure that it complied with the requirements of the SDWA and UIC permitting program, not NEPA.[13] Contrary to the Tribe's assertion, the Region does not need to conduct a "functional equivalence test" each time it issues a UIC permit as that runs directly counter to the well-settled doctrine of functional equivalence.

In its reply brief, the Tribe attempts to distinguish some of the cases the Region relied on, claiming that those cases "stand only for the proposition that the Region need not go through the procedural step of preparing a formal [Environmental Impact Statement] document," and that "excusing the Region from * * * preparing an [Environmental Impact Statement] under the 'functional equivalence doctrine' does *not* exempt the Region from providing the 'full and adequate consideration of environmental issues' as statutorily required by NEPA." Tribe's Reply Br. at 11 (distinguishing *W. Neb. Res. Council v. U.S. EPA*, 943 F.2d 867 (8th Cir. 1991), *In re Am. Soda, LLP*, 9 E.A.D. 280 (EAB 2000) and *Warren Cnty. v. North Carolina*, 528 F. Supp. 276 (E.D. N.C. 1981)). The Tribe misconstrues the cases as well as the functional equivalence doctrine. The court in *Warren County* explained that application of the functional equivalence doctrine "hinges on whether the agency is engaged primarily in an examination of environmental questions," and therefore, as stated earlier in this decision, "where a federal agency [like EPA] is engaged primarily in an examination of environmental questions, and where substantive and procedural standards ensure full and adequate consideration of environmental issues, then formal compliance with NEPA is not necessary, [and] functional compliance [is] * * * sufficient." 528 F. Supp. at 286-87. In *Western Nebraska Resource Council*, the U.S. Court of Appeals for

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[13] For this reason, the Tribe's challenge to the Region's cumulative effects analysis that the Region conducted pursuant to the SDWA UIC regulations at 40 C.F.R. § 144.33(c)(3), *see* Pet. at 35, 38, should be analyzed under the UIC regulations, not NEPA.

the Eighth Circuit explained that EPA need not "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 functional equivalents of the impact statement process.'" *W. Neb. Res. Council*, 943 F.2d at 871-72 (quoting *Ala. ex rel. Siegelman v. EPA*, 911 F.2d 499, 504 (11th Cir. 1990)).[14] The Eighth Circuit concluded that "the SDWA is such legislation." *Id*. at 872. And in *American Soda*, the Board explained that the UIC permit program is functionally equivalent to NEPA. 9 E.A.D. at 291. The Tribe's arguments in the reply brief are contrary to federal caselaw and Board precedent.[15]

Moreover, the Agency codified the functional equivalence doctrine in 40 C.F.R. § 124.9(b)(6). To the extent the Tribe is attempting to mount a challenge to 40 C.F.R. § 124.9(b)(6), as stated in our November 2023 order, "[i]t is well-settled that the Board generally does not consider challenges to EPA

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[14] In *Western Nebraska*, the petitioner challenged an EPA action under the SDWA, arguing that EPA violated NEPA by failing to prepare an Environmental Assessment or Environmental Impact Statement. 943 F.2d at 871-72.

[15] The Tribe's misunderstanding of the functional equivalence doctrine is also reflected in arguments in the petition where the Tribe cites NEPA and UIC regulations, as well as NEPA's "hard look standard," as support for its NEPA claims. *See* Pet. at 8, 23-33. As noted in the text above, the UIC permits at issue here are exempt from NEPA requirements as the UIC permit program is functionally equivalent to NEPA. The hard look standard the Tribe references applies in determining whether an agency has complied with NEPA's environmental analysis obligations, which do not apply here. *See, e.g*., *Sierra Club v. Kimbell*, 623 F.3d 549, 559 (8th Cir. 2010) (explaining that the Environmental Impact Statement is "the primary procedural vehicle" that ensures that an agency engages in a "hard look" review of the environmental consequences of its actions). Under 40 C.F.R. § 124.9(b)(6), the Region need not conduct an EIS.

We also note that, although the Region has no obligation to complete a NEPA review for the UIC permits at issue here, as Powertech correctly points out in its response brief, the NEPA regulations were amended in July 2020, and those amendments, in effect at the time the Region made the permitting decisions at issue here, removed the "cumulative effects" definition on which the Tribe relies in its petition. Powertech's Resp. Br. at 10 n.2; *see* Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304, 43,343-44 (July 16, 2020); *Ariz. Pub. Serv. Co*., 18 E.A.D. at 264 (applicable rules are those in effect at the time of permit issuance).

regulations." Board's Nov. 2023 Order at 19 n.18 (citing *In re Muskegon Dev. Co.*, 18 E.A.D. 88, 104-5 (EAB 2020)).

C. *The Tribe's Administrative Record Claim*

In its petition, the Tribe claims that the Region omitted "[s]everal significant documents" from the administrative record in this proceeding. Pet. at 45. This challenge is predicated on documents that the Tribe obtained from the Region via a Freedom of Information Act ("FOIA") request, and the Tribe included several of these documents with its comments on the 2017 draft permits. *See id*. at 45-46; Tribe's Comments on 2017 Draft Permits at 20. The Tribe argues that the documents it obtained through FOIA must be made part of the administrative record and that the Region arbitrarily refused to include such documents in the record "because [the Region] considers the record to begin only when the latest draft of the [Class III permit] application was finalized in 2013." Pet. at 45 (citing Resp. to Cmts. at 233 (Cmt. # 185)). The Tribe questions the Region's reliance on the 2013 date, noting that Powertech submitted its Class III permit application in 2008.[16] *See id*. at 46. The Tribe asserts that documents reflecting coordination between the Region and Powertech, including those dated prior to submission of the final revised Class III permit application in 2013, should be part of the record. *Id*. at 45-45.

In its brief before the Board, the Region describes its responses to the Tribe's comment regarding the administrative record and the documents attached to the Tribe's 2017 comments, stating, "As explained 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." Reg.'s Resp. Br. at 29-30. The Region applies an incorrect legal standard regarding the administrative record. The Board also observes that over

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[16] More specifically, the Tribe states that the Class III permit application was "submitted as complete" in 2008. Pet. at 46. According to a February 3, 2014 letter from Powertech to the Region, the Region determined the December 2008 Class III permit application to be administratively complete in February 2009 and the Class V application to be administratively complete in April 2010. *See* Powertech Letter at 2; *see also* Letter from Steven Pratt, Dir., Ground Water Program, Region 8, U.S. EPA, to Richard Blubaugh, Powertech (USA) Inc. (Apr. 28, 2010) (filed with Pet. as attach. 27). As noted earlier in this decision, Powertech revised the Class III and Class V permit applications in 2012 and provided additional updates to the Class III application in 2013. *See* Part II.A, above.

the course of this proceeding, the Region has provided explanations and responses regarding the administrative record that create more confusion as to which documents the Region considered or did not consider in making its permitting decision. *See* notes 19, 21-22, below.

First, the Region incorrectly draws a bright line as to the content of the administrative record, stating that the documents identified by the Tribe are not required to be part of the record because they "pre-dated submission of the final permit application in 2013." *See* Reg.'s Resp. Br. at 29-30 (summarizing content of responses to comments 184 and 185); Resp. to Cmts. at 233 (Cmt. # 185) (reflecting the Region's view that only communications between EPA and Powertech that post-date submission of the 2013 Class III revised permit application are required to be included in the administrative record). The part 124 regulations governing the contents of the administrative record do not contain the bright line the Region articulates—i.e., that materials are excluded from the administrative record if they pre-date submission of a "final" permit application. The regulations specify the items that must be part of the administrative record and the decision to include or omit documents from the record should be based on that regulatory standard, not whether a document pre-dates the submission of the 2013 revised permit application. *See* 40 C.F.R. § 124.9(b) (listing items that must be part of the administrative record for the draft permit, which include "the application, if required, and any supporting data furnished by the applicant"); *id*. § 124.18(b) (listing items that must be part of the record for the final permit, which include "[a]ll comments received during the public comment period").[17]

Second, contrary to the Region's position, the documents attached to the Tribe's 2017 comments are required to be part of the administrative record under 40 C.F.R. § 124.18. *See* Reg.'s Resp. Br. at 29-31; Resp. to Cmts. at 233 (Cmt. # 185). That section provides that the administrative record for a final permit "shall consist of * * * all comments received during the public comment period." 40 C.F.R. § 124.18(b)(1). The Region argues that these documents do not need to

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[17] The Region's response brief and response to comments focus on January 2013, the date Powertech submitted the revised Class III permit application. Resp. to Cmts. at 233 (Cmt. # 185); Reg.'s Resp. Br. at 29-30. Even setting aside the Region's application of an incorrect legal standard, it is unclear on the current record why the Region focuses exclusively on the 2013 date when the initial Class III permit application was submitted in December 2008, and according to Powertech, the Region deemed that application "administratively complete" in February 2009. Powertech Letter at 2 (summarizing permit application history from 2008 to 2013).

be part of the record because they were not considered by the Region to inform its permitting decisions. Reg.'s Resp. Br. at 29, 31 (addressing responses to comments # 184 and 185). This argument misses the mark, as the Tribe's comments regarding the administrative record and the attachments to those comments fall within 40 C.F.R. § 124.18(b)(1) and are required to be part of the record.[18] *See In re Prairie State Generating Co*., 13 E.A.D. 1, 66 (EAB 2006) (discussing the part 124 regulations and noting that "all documents and comments submitted by the public during [the public comment period] must be included in the administrative record"), *pet. for review denied sub nom. Sierra Club v. EPA*, 499 F.3d 653 (7th Cir. 2007); *In re City of Moscow*, 10 E.A.D. at 162 n.59 (noting attachment to comment "is appropriately considered part of the administrative record").[19]

The Region offers an additional justification for not including the communications between the Region and Powertech attached to the Tribe's 2017 comments in the administrative record, stating that they were "'for the purpose of providing technical assistance to Powertech in order to develop complete UIC permit applications, not to acquire information from them to inform permitting * * * decisions.'"[20] Reg.'s Resp. Br. at 30 (quoting Resp. to Cmts. at 234 (Cmt.

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[18] In addition, Attachment 30 to the petition, entitled "Discussion of Zone of Influence, Area of Review, and the Aquifer Exemption Boundary for Class III Injection Wells used for the In-Situ Leaching (ISL) of Uranium" ("Discussion Document"), appended to the Tribe's 2017 comments, is part of the administrative record under 40 C.F.R. § 124.17(b), as the Region cites the document in its response to comments. *See* 40 C.F.R. § 124.17(b); *In re Ash Grove Cement Co*., 7 E.A.D. 387, 427-48 (EAB 1997).

[19] The Board notes that an examination of the record shows that the documents appended to the Tribe's 2017 comments are part of the certified index to the administrative record. *See, e.g.*, Tribe's 2017 Comments at 1671-75, 1734-35, 1739-2037, 2038-2120 (documents related to the Tribe's administrative record claim). This does not change the result here as the Region maintains that these documents are not part of the administrative record and affirmatively states in its response brief that it did not consider them to inform its permitting decisions. *See* Resp. to Cmts. at 234 (Cmt. # 185); Reg.'s Resp. Br. at 29, 31. The fact that these documents are included in the administrative record underscores the Region's lack of familiarity with the record. As discussed below, under the circumstances presented here, the matter must be remanded to the Region.

[20] It is unclear what the Region means by "technical assistance," particularly with regard to the Discussion Document. *See* Reg.'s Resp. Br. at 30; Oral Arg. Tr. at 80-84. That document discusses the relevant regulations governing the "area of review" and states "[t]he zone of endangering influence calculation in the regulations is not appropriate for an

185)). The Board observes that whether a document provides or constitutes "technical assistance" is untethered to the regulatory language in part 124 governing the content of the administrative record.[21]

Given the Region's incorrect views and approach regarding the administrative record and documents it argues are not or should not be part of the record, a remand to the Region is necessary. As discussed in Part III, above, "the Board examines the administrative record * * * to determine whether the permit issuer exercised 'considered judgment.' * * * As a whole, the record must demonstrate that the permit issuer 'duly considered the issues raised in the comments' and ultimately adopted an approach that 'is rational in light of all information in the record.'" *In re U.S. Dep't of Energy & Triad Nat'l Sec., LLC*, 18 E.A.D. 797, 799-800 (EAB 2022) (citations omitted). Upon examination, we find that the state of the record prevents us from determining whether the Region

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in-situ mining project, because the formula applies to injection wells that only inject, with no extraction taken into account." Discussion Document at 2; *see also* 2019 Fact Sheet at 30; Oral Arg. Tr. at 80-84. While, as discussed above, the Discussion Document is required to be part of the record, the Board observes that the Region's rationale for excluding a document from the record because it constitutes "technical assistance" remains questionable absent further elaboration from the Region as to how it defines "technical assistance" in the context of the interactions surrounding the permit decisionmaking.

[21] Other statements in the record reflect the Region's lack of familiarity with the administrative record and the documents that the Tribe asserts should be part of the record that are addressed in and appended to the Tribe's 2017 comments. For example, in responding to the Tribe's comment raising concerns that the Region developed guidance based on discussions with Powertech and the uranium industry, the Region stated that it "had regular communication with Powertech, but not the uranium industry generally, throughout the application and review process." Resp. to Cmts. at 231 (Cmt. # 183). According to the Tribe, Pet. at 47, this response is at odds with statements in a document prepared by the Region and included as Attachment 29 to the petition ("OPRA document"), where the Region states that "in developing permit application guidance documents and policy statements," the Region "consulted or met with a number of mining companies with interests in Region 8." Pet. attach. 29 ¶ V. When the Region was asked about the Tribe's asserted conflict between the OPRA document and the Response to Comments document, the Region noted that the OPRA document was "probably [] deliberative" and did not contain specific information about the UIC permit applications for the Dewey-Burdock project. Oral Arg. Tr. at 88. Yet, the OPRA document specifically references the Dewey-Burdock project and discusses the site with regard to drinking water wells. Pet. attach. 29 at 1, 3.

exercised considered judgment with respect to the Tribe's comments regarding the administrative record, whether the record is complete and contains all of the materials required by the part 124 regulations, and whether the permit decisions were based on the full record, including comments and attachments thereto received during the public comment period.[22]

Accordingly, the Board remands the permits in part and directs the Region to apply the correct legal standard for developing the administrative record, ensure that the record includes all materials required by the part 124 regulations, consider any comments received on the parts of the permit decisions not disposed of by this order in light of any updated record, revise its response to comments document, and take further action, as appropriate, consistent with the part 124 regulations, in reissuing its permit decisions.[23]

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[22] Oral argument provided no clarity on the administrative record issue. For example, in response to a question as to whether the Region believed that only communications that occurred after submission of the 2013 revised permit application should be part of the administrative record, the Region agreed but, after further questioning, seemed to disavow the application of a bright line in determining the record. Oral Arg. Tr. at 79-80, 90. Similarly, in addressing the Discussion Document attached to the Tribe's 2017 comments, the Region first reiterated that the document was not part of the administrative record and then, after further questioning, stated it was part of the record. *Id*. at 85. In any event, the Board has consistently held that the Region cannot overcome failures in its decision-making by providing further articulation on appeal or at oral argument. *See, e.g.*, *In re Muskegon Dev. Co.*, 17 E.A.D. 740, 751 (EAB 2019) (stating, "The Region cannot overcome a failure to meaningfully consider and address significant comments when issuing the final Permit by supplying articulations on appeal to the Board."); *see also In re Conocophillips Co*., 13 E.A.D. 768, 785 (EAB 2008) (explaining that "allowing the permit issuer to supply its rationale after the fact, during the briefing for an appeal, does nothing to ensure that the original decision was based on the permit issuer's 'considered judgment' at the time the decision was made").

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

To be clear, because of the errors identified in this decision, the Board is not in a position at this time to reach the merits of the remaining issues in the petition that involve legal and factual questions. The Board preserves for review: (1) the SDWA issues addressed in the petition, including the Tribe's challenges to the Region's cumulative

V. *CONCLUSION*

For the reasons stated above, the Board denies review in part, remands the permit decisions in part, and preserves the issues set forth in Part IV.C note 23.[24]

So ordered.

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effects analysis under EPA's UIC regulations at 40 C.F.R. § 144.33(c)(3), and (2) the Tribe's de facto rulemaking claim. To the extent that these preserved issues remain after remand, the Tribe may, if it so chooses, raise these issues in a new petition seeking review of the Region's action on remand. For efficiency purposes, the Tribe, the Region, or Powertech may incorporate by reference any arguments raised in this appeal concerning the preserved issues into any new appeal arising from the remand action.

[24] With respect to the issues resolved by this order, we have considered all of the arguments raised in the petition, the response and reply briefs, and at oral argument, whether or not they are specifically discussed in this order. All pending motions are denied as moot.

CERTIFICATE OF SERVICE

I certify that copies of the foregoing *Order Denying Review in Part and Remanding in Part* in the matter of Powertech (USA) Inc., UIC Appeal No. 20-01, were sent to the following persons in the manner indicated.

By Email:

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

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

Attorney for Amicus Curiae Great Plains Tribal Water Alliance, Inc.
Peter Capossela, PC, Attorney at Law
P.O. Box 10643
Eugene, Oregon 97440
(541) 505-4883
pcapossela@nu-world.com

Attorneys for Powertech (USA) Inc.
Robert F. Van Voorhees
Van Voorhees PLLC
1155 F Street, NW, Suite 700
Washington, D.C. 20004-1357
(202) 365-3277
bob.vanvoorhees@gmail.com

Jason A. Hill
Holland & Knight LLP
811 Main Street, Suite 2500
Houston, Texas 77002
(713) 244-8224
jason.hill@hklaw.com

Attorneys for EPA
Lucita Chin, Senior Assistant Regional Counsel
Michael Boydston, Senior Assistant Regional Counsel
U.S. Environmental Protection Agency, Region 8
1595 Wynkoop Street
Mail Codes: 8ORC-LC-M, 8ORC-LC-G
Denver, Colorado 80202
(303) 312-7832
chin.lucita@epa.gov
boydston.michael@epa.gov

Katie Spidalieri, Attorney-Advisor
Water Law Office, Office of General Counsel
U.S. Environmental Protection Agency
(202) 564-4138
spidalieri.katie@epa.gov

Dated: Sep 03, 2024

Emilio Cortes

Emilio Cortes
Clerk of the Board