

INITIALS cc

**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

ORDER REQUIRING ADDITIONAL BRIEFING

The Oglala Sioux Tribe (“Tribe”) filed the petition for review in the above-captioned matter on December 24, 2020. This matter has been stayed since February 23, 2021, primarily to allow for the resolution of litigation before the United States Court of Appeals for the District of Columbia Circuit in *Oglala Sioux Tribe v. U.S. Nuclear Regulatory Commission*, No. 20-1489. In the March 13, 2023 joint status report, the Tribe requested a thirty-day period “to review and potentially amend its Petition for Review in this matter in light of the changed circumstances since the stay was entered, including but not limited to the D.C. Circuit Court of Appeals ruling.” Joint Status Report at 3-4 (Mar. 13, 2023). On March 22, 2023, the Board issued an order, setting deadlines for the filing of any motion to amend the petition and any subsequent responses and extending the stay of proceedings except for the potential filing of the motion to amend. Order Setting Deadline for Any Motion to Amend the Petition (Mar. 22, 2023).

On April 21, 2023, the Tribe filed a motion to amend its petition for review. Motion to Amend Petition for Review (April 21, 2023). In its motion, the Tribe states that since filing its petition “significant events have transpired which bear directly on this Board’s review of the matters raised in the Petition,” namely: (1) the development of a cultural resources survey protocol for the Crow Butte Resources Inc. In Situ Uranium Recovery Facility in Nebraska; (2) the passing of a local ordinance in Fall River County, South Dakota, that designates the mining

of uranium a public nuisance; and (3) the “[s]ignificant changes in the scope” of the Dewey-Burdock Project as “announced in regulatory documents filed by Powertech.” *Id.* at 1-2. The Region and Powertech (USA) Inc. each filed a response opposing the Tribe’s motion to amend the petition. *See* EPA Region 8 Response to Petitioner’s Motion to Amend Petition for Review (May 8, 2023); Powertech’s Response in Opposition to Petitioner’s Motion to Amend Petition (May 8, 2023).

The Board has determined that additional briefing would assist in its consideration of the motion to amend the petition. Accordingly, the Board directs the parties to:

1. Address the impact of the D.C. Circuit’s decision in *Oglala Sioux Tribe v. U.S. Nuclear Regulatory Commission*, 45 F.4th 291 (D.C. Cir. 2022), on the issues set forth in the petition for review filed on December 24, 2020, and identify what remains for resolution by the Board.
2. Explain, in light of the D.C. Circuit’s decision in *Oglala Sioux Tribe v. U.S. Nuclear Regulatory Commission*, 45 F.4th 291 (D.C. Cir. 2022), the relevance of the cultural resources survey protocol for the Crow Butte Resources Inc. In Situ Uranium Recovery Facility in Nebraska to the November 24, 2020, permitting decisions at issue here.
3. Explain how Board consideration of the November 2022 local ordinance referenced in the Tribe’s motion to amend is consistent with Board precedent addressing the scope of Board review of UIC permitting decisions. *See, e.g., In re Sammy-Mar, L.L.C.*, 17 E.A.D. 88, 98 (EAB 2016); *In re Envtl. Disposal Sys.*, 12 E.A.D. 254, 266-267 (EAB 2005); *In re Federated Oil & Gas*, 6 E.A.D. 722, 725 (EAB 1997).
4. Address how Board consideration of the three technical reports the Tribe identifies in its motion to amend (dated December 23, 2020, May 10, 2021, and August 10, 2021) comports with the regulations at 40 C.F.R. §§ 124.9, .18(b) and (c) that set forth the contents of the administrative record and deem it complete on the date the final permit is issued, as well as Board precedent on supplementing the administrative record as addressed in *In re Gen. Elec. Co.*, 18 E.A.D. 575, 610-11 (EAB 2022).


Each party’s response to this Order shall not exceed ten (10) pages in length and must be filed and served on or before **Friday, July 14, 2023**. The Region’s response to the petition, any response to the petition Powertech may wish to file, and responses by the parties to any other

pleadings including responses to the pending motions and pleadings filed on May 18, 2021, and May 28, 2021, remain stayed and held in abeyance until directed otherwise by the Board. Notwithstanding this order, the Board may lift the stay or take other appropriate action in this matter at any time in accordance with the Board's responsibility to manage its docket. *See* 40 C.F.R. § 124.19(n).

So ordered.

ENVIRONMENTAL APPEALS BOARD

Dated: June 30, 2023

By: 
Wendy L. Blake
Environmental Appeals Judge

CERTIFICATE OF SERVICE

I certify that copies of the foregoing *Order Requiring Additional Briefing* in the matter of Powertech (USA) Inc., UIC Appeal No. 20-01, were sent to the following persons in the manner indicated.

By Email:

Attorney for Petitioner

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, Oregon 97440
(541) 505-4883
pcapossela@nu-world.com

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

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

Attorneys for EPA

Lucita Chin, Senior Assistant Regional Counsel
Michael Boydston, Senior Assistant Regional Counsel
Environmental Protection Agency, Region 8
1595 Wynkoop St.
Mail Codes: 8ORC-LC-M, 8ORC-LC-G
Denver, CO 80202
chin.lucita@epa.gov
boydston.michael@epa.gov

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

Dated: Jun 30, 2023

Emilio Cortes

Emilio Cortes
Clerk of the Board