

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

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

**ORDER SETTING DEADLINE FOR RESPONSE
TO REGION’S MOTION FOR FURTHER STAY**

On February 23, 2021, the Environmental Appeals Board (“Board”) issued an order granting in part the U.S. Environmental Protection Agency Region 8 (“Region”) motion for a stay and directing the Region to file a status report addressing the status of its review and consultations on this matter with the new Administration and relevant Headquarters offices, and the anticipated timing of the Region’s further actions on the permit decision. *Order Staying Proceedings for Sixty Days* 3-4 (Feb. 23, 2021). The Board Order stayed the matter until April 26, 2021. *Id.* at 4. On April 19, 2021, the Region filed its status report along with a motion seeking a further stay of the proceedings before Board. *See* Status Report and Motion to Stay of Proceedings (April 19, 2021). In its status report the Region represents that it “briefed and consulted with appropriate newly appointed Agency decision makers,” *id.* at 2, and requests a further stay “in light of the potential for this action to be affected by litigation pending in the D.C. Circuit Court of Appeals.” *Id.* at 3. It states that “unless otherwise directed by the Board, the Region does not anticipate taking further action on the permits at issue” here “until after the resolution of the D.C. Circuit litigation” and that it cannot know when a decision in that litigation will be forthcoming. *Id.*

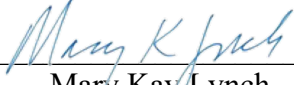
In its motion for an additional stay, the Region explains that in connection with the UIC permitting process in this matter it designated the Nuclear Regulatory Commission (“NRC”) as the lead federal agency for National Historic Preservation Act (“NHPA”) section 106 compliance pursuant to 36 C.F.R. § 800.2(a)(2), and claims that the final D.C. Circuit decision would have a significant effect on the proceedings before the Board. *See id.* 3-5. The Region further explains that the Oglala Sioux Tribe (with others) has filed a challenge in the D.C. Circuit Court of Appeals to the NRC’s decision to issue a Source Materials License for Powertech’s project under the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, and related regulations, in which Oglala claims, among other things, that the NRC failed to satisfy “the substantive and procedural duties” under the NHPA. *Id.* at 2. The Region claims that “if the D.C. Circuit upholds the NRC’s section 106 compliance, then the NHPA issues before the Board will be greatly simplified,” and on the other hand “if the D.C. Circuit were to find the NRC in noncompliance with section 106, the Region would request a remand of the permits to allow it to evaluate other approaches to establishing NHPA compliance.” *Id.* at 4. The Region also claims that Petitioner will not be prejudiced by a stay because the UIC permits are stayed during the appeal process, and that Powertech will not be prejudiced “because they have not secured necessary permits from the State of South Dakota and cannot proceed with the project until receiving those permits.” *Id.* at 5. Finally, the Region states that it contacted Powertech’s representatives and Petitioner’s attorney to ascertain whether the parties would concur or oppose this motion. *Id.* at 6. The Region reports that Petitioner does not oppose the motion, but that Powertech stated that the company was unable to say whether it opposes the motion without having an opportunity to read the Region’s motion first. *Id.*

In light of the status report and motion, the Board directs Powertech to file a response addressing the Region's request for a further stay. If Powertech decides to oppose the motion, it must include the grounds for its opposition, including support for its statement in its prior pleading that the proceedings in the D.C. Circuit case "regardless of the outcome, would not affect the issues that are properly before the Board in this Petition for Review." Powertech Response to Respondent's Motion for Stay of Proceedings at 2 (Feb. 19, 2021). Powertech should also explain its prior statement that a stay of proceedings before the Board would delay or affect the proceedings before the State of South Dakota.¹ Powertech's response must be filed by no later than **Tuesday, May 4, 2021**. The current briefing schedule for the Region's response, any response Powertech may wish to file, and other pleadings in this matter are now stayed pending resolution of the Region's motion.

So ordered.

ENVIRONMENTAL APPEALS BOARD

Dated: Apr 21, 2021

By: 
Mary Kay Lynch
Environmental Appeals Judge

¹ In a prior filing with the Board, Powertech represented that it would be prejudiced by further delays in this case because "this proceeding is preventing the permits at issue (which Powertech has been seeking since 2013) from becoming effective, and Powertech's efforts to obtain all other necessary approvals, including those before the State of South Dakota, may be hindered by any delays." Powertech Response to Respondent's Motion for Stay of Proceedings at 1-2 (Feb. 19, 2021).

CERTIFICATE OF SERVICE

I certify that copies of the foregoing *Order Setting Deadline for Response to Region's Motion for Further Stay* in the matter of Powertech (USA) Inc., UIC Appeal No. 20-01, were sent to the following persons in the manner indicated.

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Dated: Apr 21, 2021



Eurika Durr
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