

**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

**OPPOSITION OF POWERTECH (USA) INC.
TO RESPONDENTS' MOTION FOR FURTHER STAY**

Powertech (USA) Inc. ("Powertech") hereby responds to Respondent's April 19, 2021 Motion for Further Stay (the "Motion"). For the reasons stated below, the Motion should be denied.

INTRODUCTION

The permits at issue (the "Permits") are required for an in-situ recovery ("ISR") uranium mining operation in South Dakota (the "Dewey-Burdock Project"). Such operations are subject to comprehensive regulation by the Nuclear Regulatory Commission (NRC) pursuant to the Atomic Energy Act of 1954, 42 U.S.C. § 2011 *et seq.*, and the injection wells used in the operations are also subject to UIC Program regulation implementing the Safe Drinking Water Act, 42 U.S.C. 300f *et seq.*

The Permits are the product of a lengthy administrative process conducted in tandem with the even lengthier and more comprehensive NRC licensing process for the Dewey-Burdock Project. Petitioner seeks review of the Permits, claiming, among other things, that the Region's compliance with National Historic Preservation Act ("NHPA") requirements was inadequate. The Region seeks to stay this proceeding pending judicial review of the NRC license for the Dewey-Burdock Project pursuant to a Petition for Review Petitioner filed in the U.S. Court of Appeals for the D.C. Circuit (the "NRC Case"). The premise of the Region's Motion is that the resolution of the NRC Case could have a material bearing on the issues presented in this proceeding. That premise is incorrect. The UIC permitting process is complete, the Permits are now subject to the Board's review, and the Board's task is to review the issues properly raised before it based on the administrative record of the UIC permitting proceeding. As explained below, the NRC licensing decision and the underlying administrative record for that proceeding are before the D.C. Circuit rather than this Board, and a decision in the NRC Case should have no bearing on the issues properly raised before the Board.

Any further delay in this proceeding will be prejudicial to Powertech by imposing a substantial additional delay contrary to the provisions and underlying purpose of the Board's enabling regulations. Moreover, further delay poses substantial risk of undermining the efforts of Powertech to obtain resumption and

completion of South Dakota state permit proceedings over opposition from intervenors who seek to prevent resumption of those essential permit actions until all review actions for the federal NRC and EPA permits are resolved.

BACKGROUND

The NHPA and its implementing regulations require Federal agencies to “take into account the effects of their undertakings on historic properties” through participation in what is referred to as the “section 106 process.” 36 C.F.R. § 800.1(a). Agencies must “make a reasonable and good faith effort” to identify relevant historic properties,” and must consult with “any Indian tribe . . . that attaches religious and cultural significance to historic properties that may be affected by an undertaking.” 36 C.F.R. §§ 800.4(b)(1), 800.2(c)(ii). Such consultation must provide consulting tribes with “a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties . . . articulate its views on the undertaking’s effects on such properties, and participate in the resolution of adverse effects. 36 C.F.R. § 800.2(c)(ii)(2)(A).

Where an undertaking requires actions by more than one Federal agency, the Federal agencies “may designate a lead Federal agency” to “act on their behalf” to satisfy their collective responsibilities under section 106.” 36 C.F.R. § 800.2(a)(2). Agencies can also comply by means of a programmatic agreement (“PA”)

approved by the Advisory Council on Historic Preservation (“ACHP”), the agency responsible for overall implementation of the NHPA. In such cases, the PA provides alternative section 106 compliance procedures as a substitute for those provided by the ACHP’s regulations. 36 C.F.R. § 800.14(a)(4). In such cases, “[c]ompliance with the procedures established by an approved programmatic agreement satisfies the agency’s section 106 responsibilities for all individual undertakings of the program covered by the agreement until it expires or is terminated.” 36 C.F.R. § 800.14(b)(2)(iii); *Dine Citizens Against Ruining Our Environment v. Bernhardt*, 923 F.3d 831, 846 (10th Cir. 2019).

The NRC developed a PA for the Dewey-Burdock Project that was reviewed and approved by the ACHP.¹ The PA documents the fact that the PA was the product of tribal consultation efforts that commenced in 2010, that Petitioner was a consulting party, and that substantial consultation efforts occurred prior to the ACHP’s approval of the PA. *See* Attachment A at 2-4. The ACHP’s letter affirming its signature on the PA stated that “[o]ur signature completes the requirements of Section 106 of the National Historic Preservation Act...and the Advisory Council on Historic Preservation’s...regulations at 36 C.F.R. Part 800.” Letter from Reid Nelson, Director, Office of Federal Agency Programs, ACHP, to Kevin Hseuh, Chief, Environmental Review Branch (April 7, 2014)

¹ A copy of the PA is attached as Attachment A to this Opposition.

(Attachment B). The injection well operations authorized by the Permits are part of the undertaking covered by the PA, EPA was an invited signatory to the PA, and Stipulation 7 of the PA states that “[a]ny federal agency that will provide approvals or assistance for the undertaking as presently proposed may comply with its Section 106 responsibilities for the undertaking by agreeing to the terms of this PA in writing and sending copies of such written agreement to all the signatories and consulting parties of this PA.”²

The Region engaged in extensive section 106 compliance activities of its own – including consultation efforts – between 2013 and 2020. See EPA’s Response to Comments (“RTC”) at 297-304 (Attachment 35 to the Petition in this case). However, EPA has also been involved in discussions concerning the PA, and its NHPA Draft Compliance and Review Document for the Proposed Dewey-Burdock In-Situ Uranium Recovery Project (included in the docket for the draft permits) stated that the Region “was considering whether to rely on the NRC’s section 106 review and consultation, which would be accomplished by adopting the NRC PA, or whether to complete a separate section 106 process.” RTC at 310. The Region ultimately adopted the PA to comply with the NHPA as contemplated by the regulations and the terms of the PA itself. *Id.* In doing so, the Region stated

² The PA was also signed by the U.S. Department of Interior, Bureau of Land Management, and the South Dakota State Historic Preservation Officer.

that it “agrees to the terms of the PA, joins the PA as a full signatory, and will participate in implementing applicable terms of the PA.” *See* November 11, 2020 letter from Darcy O’Connor, Director, EPA Region 8 Water Division, to John Tappert, Federal Preservation Officer, NRC Division of Rulemaking, Environmental, and Financial Support (Attachment C). Further, the Region designated the NRC as at the lead agency for purposes of NHPA compliance. *Id.* This outcome comprehensively addresses potential impacts on cultural resources, because the PA, NRC license, and UIC permits for the Dewey-Burdock Project all impose ongoing notification and consultation requirements that will be triggered if issues concerning potential impacts on cultural resources arise. *See e.g.*, Underground Injection Control Final Class V Area Permit No. SD52173-00000 at 41 (November 24, 2020).

The Region’s response to comment explained that the PA imposes ongoing compliance obligations, that the Region would “participate in accordance with [its] role as a signatory to the PA” with the NRC acting as the lead agency. Therefore, “EPA’s signature on the PA is sufficient to establish the Agency’s compliance with the NHPA” as specified by the PA and applicable regulations.³ The Region responded to comment suggesting that further NHPA consultation was required prior

³ RTC at 311-21. While the Region must actually comply with the terms of the PA, its compliance with the terms of the PA has not been challenged in this case.

to permit issuance by explaining that it had the option of agreeing to the terms of the PA and designating the NRC as the lead agency for NHPA compliance instead. RTC at 308-09, 311-12. The Region also responded to claims that the NRC's NHPA compliance efforts (and thus the PA) had been determined to be inadequate by explaining that such claims were false. *Id.* at 312.

ARGUMENT

A. The NRC Case Has No Material Relevance to the Issues Before the Board.

Petitioner claims that the Region “failed to comply with the consultation and historic resources protection requirements of the NHPA” because “there has never been a competent Lakota cultural resources survey of the Dewey Burdock site.” Petition for Review (“Pet.”) at 16, 21-22. Petitioner asserts that the alleged lack of a “competent Lakota cultural resources survey of the Dewey Burdock site is an “incontrovertible fact . . . established by the Nuclear Regulatory Commission’s Atomic Safety and Licensing Board (ASLB) . . . ruling in LBP-15-16.” *Id.*, and argues that “[b]y relying on incompetent cultural resources survey and uninformed analyses of the property and dismissing the Tribe’s attempts to rectify this error, EPA failed to comply with its obligations under NHPA to meaningfully consult with the Tribe.” Pet. at 17.

1. The Scope of the Board’s Review is Narrow.

In the context of petitions for review of UIC permits “the Board’s power of review ‘should be only sparingly exercised’” and “the burden of demonstrating that review is warranted rests with the petitioner.” *In re Environmental Disposal Systems, Inc.*, 12 E.A.D. 254, 263-64 (EAB 2005) (*quoting* 45 Fed. Reg. 33,290, 33,412 (May 19, 1980)).

The scope of the Board’s review is limited by the principle that “parties objecting to a federally-issued UIC permit must base their objections on the criteria set forth in Safe Drinking Water Act and its implementing regulations.” *In re Brine Disposal Well, Montmorency County, Michigan*, 4 E.A.D. 736, 742 (EAB 1993). Challenges to UIC permits must therefore “pertain exclusively to the UIC program and its focus on protecting underground sources of drinking water from possible harm caused by underground injection activities.” *In re Jordan Development Co.*, 18 E.A.D. 1, 11 (EAB 2019). In addition, the Board only considers issues properly raised before it. Petitioners must identify “the specific challenge to the permit decision and clearly set forth, with legal and factual support, petitioner’s contentions” and “demonstrate that each challenge to the permit decision is based on a finding of fact or conclusion of law that is clearly erroneous.” 40 C.F.R. § 124.19(a)(4)(i). Petitioners “must demonstrate, by providing specific citation or other appropriate reference to the administrative

record (*e.g.*, by including the document name and page number), that each issue being raised in the petition was raised during the public comment period” or “explain why such issues were not required to be raised during the public comment period.” 40 C.F.R. § 124.19(a)(4)(ii). In addition, where issues have been addressed in the Region’s response to comment, the “petitioner must provide a citation to the relevant comment and response and explain why the Regional Administrator’s response to the comment was clearly erroneous or otherwise warrants review.” *Id.*

2. Petitioner Has Raised No Cognizable NHPA Challenges.

The Petition for Review does not provide “specific citation or other appropriate reference to the administrative record” to show that “each issue being raised in the petition was raised during the public comment period” or demonstrate that the issues raised were not “reasonably ascertainable” during the public comment period. *See In re Phelps Dodge Corporation Verde Valley Ranch Development*, 10 E.A.D. 460, 507-08 & n. 41 (EAB 2002). Instead, the Petition simply states that “as discussed *infra*, both sets of comments submitted by Petitioner in 2017 and 2019 detail” the Region’s failure to comply with NHPA requirements. Pet. at 11. However, the nine pages of discussion devoted to Petitioner’s NHPA claims includes only two citations to the referenced comments and – more importantly – fail to explain why the Region’s response to comments

was clearly erroneous. This failure to present specific arguments is fatal to Petitioner's claims, because it is not the Board's role to distill cognizable legal arguments from a petitioner's generalized grievances. *See In re Phelps Dodge*, 10 E.A.D. at 506-06 & n. 39.

Petitioner claims that the NRC's NHPA compliance was inadequate and has challenged the adequacy of the PA in the NRC Case. Region 8 Status Report and Motion for Stay of Proceedings at 2. That challenge is now before the D.C. Circuit for review and decision. The Board is not the appropriate forum for review of NRC actions and generally does not consider the "the validity of prior, predicate regulatory decisions that are reviewable in other fora." *In re Arizona Public Service Co.*, 18 E.A.D. 245, 300 (EAB 2020), *quoting In re City of Moscow*, 10 E.A.D. 135, 160-61 (EAB 2001). It is only the Region's permitting decisions that are under review here, not the NRC's compliance in a different administrative proceeding.

Petitioner's core grievance appears to be that there has never been what the Petition refers to as a "competent Lakota cultural resources survey of the Dewey Burdock site," Pet. at 16, by which Petitioner means a survey conducted in accordance with its own unreasonable demands.⁴ Petitioner's assertion that the

⁴ As explained in the NRC's final decision in the licensing proceeding, Powertech submitted a "Class III" cultural resources survey with its NRC license application, the NRC Staff commenced consultation efforts with potentially interested Tribes,

absence of such a survey establishes that the Region “failed to comply with the consultation and historic resources protection requirements of the NHPA” (Pet. at 16) is a simple *non-sequitur* because “neither the NHPA nor the Advisory Council regulations require that *any* cultural surveys be conducted.” *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 205 F. Supp. 3d 4, 33 (D.D.C. 2016) (emphasis in original). Moreover, consultation requirements ensure a reasonable opportunity to provide input, not a right to dictate outcomes. *Narragansett Indian Tribe v. Warwick Sewer Auth.*, 334 F.3d 161, 167 (1st Cir. 2003). The fact that Petitioner’s cultural survey demands were not satisfied therefore does nothing to show that consultation was inadequate.

Petitioner’s more logical argument is that the Region’s decision to sign the PA was arbitrary because it was made in the face of precedent establishing that the PA was inadequate. Petition Pet. at 20-22. However, the Region responded to this

and a field survey was conducted with tribal participation. *In the Matter of Powertech (USA) Inc. (Dewey-Burdock In Situ Uranium Recovery Facility)*, CLI-20-09 at 24-25. Petitioner objected to the terms of the survey, and has favored a survey approach that the Atomic Safety Licensing Board found to be “patently unreasonable.” CLI-20-09, *add’l views* at 3, citing *In the Matter of Powertech (USA) Inc. (Dewey-Burdock In Situ Uranium Recovery Facility)*, LPB-15-16, 81 NRC 618, 657 & n. 229 (2015); *In the Matter of Powertech (USA) Inc. (Dewey-Burdock In Situ Uranium Recovery Facility)*, LPB-19-10, 90 NRC 287, 331 n. 227 (2019)). For an explanation of Petitioner’s position with regard to the cultural survey issues (aptly entitled “Because of Oglala Sioux Tribe Noncooperation, the Information Necessary for the NRC Staff to Perform a NEPA Analysis of Potential Impacts on the Oglala Sioux Tribe Is Unavailable”), see *id.*, 90 N.R.C. at 329-334.

argument in its response to comments, explaining that Petitioner's claim is based upon a serious mischaracterization of the relevant precedent. RTC at 312. The Petition provides no explanation of why the Region's response to comment was clearly erroneous, and "a petitioner's failure to address the permit issuer's response to comments is fatal to its request for review." *In re Indeck-Elwood, LLC*, 13 E.A.D. 126, 143, 170 (EAB 2006). Moreover, the Region's response was correct; indeed, the NRC has pointedly rejected Petitioner's claim that there is precedent establishing that the PA is inadequate:

"The Tribe additionally states that the Board's first initial decision in this case (LBP-15-16, which we affirmed in CLI-16-20) found the Programmatic Agreement to be insufficient to protect cultural resources. It therefore argues that the Programmatic Agreement has been 'invalidated by prior rulings.' But neither the Board decision in LBP-15-16 nor our decision affirming it found the Programmatic Agreement deficient for purposes for which it was entered, and those decisions do not invalidate the Programmatic Agreement."

CLI-20-09 at 18.⁵ As the NRC explained:

"In LBP-15-16, the Board found that "NRC Staff has complied with the NHPA requirement to make a good faith and reasonable effort to identify properties that are eligible for inclusion in the National Register of Historic Places within the Dewey-Burdock ISL Project area"; and

"In LPB-17-9, the Board found that the Staff had made reasonable efforts under the NHPA to consult with the Tribe concerning the project's effects on cultural resources that may be located on the site."

⁵ The NRC's decision can be accessed at: [Commission Memorandum and Order \(CLI-20-09\) \(nrc.gov\)](https://www.nrc.gov/decisions/Commission%20Memorandum%20and%20Order%20CLI-20-09.pdf)

CLI-20-09 at 23 & n. 121; *see also* 85 Fed. Reg. 80194 at 80195 (December 11, 2020) (“[O]n October 19, 2017, the ASLB . . . determined that the NRC staff’s efforts satisfied the National Historic Preservation Act (NHPA) requirement that the NRC staff consult with the Oglala Sioux Tribe”). Accordingly, Petitioner’s argument that the Region unreasonably chose to rely on NRC compliance efforts that had been found to be inadequate fails for the reason that its core factual premise is false.

Here the Region reasonably chose to adopt the PA that had been found to be sufficient by both the ACHP – the regulatory authority on NHPA compliance – and the NRC. The Region’s response to comment explained Petitioner’s claim that the PA had been found to be inadequate was false and that further consultation was not required because the Region satisfied its Section 106 requirements by agreeing to the terms of the PA. The Petition provided no explanation of why the Region’s response to comment on these issues was clearly erroneous and thus raises no cognizable NHPA issues. Petitioner’s NHPA arguments can and should be dismissed for that reason. There is no decision in the NRC Case that could justify a different outcome, because NRC’s NHPA compliance is not before the Board and – even if the NRC’s compliance were ultimately found wanting by the D.C. Circuit – nothing would change the fact that the Region’s decision to sign the PA was reasonable when it was made.

B. A Stay Would be Prejudicial to Powertech.

Proceedings before the Board on this Petition have already been stayed for more than one hundred thirty (130) days to the substantial detriment of Powertech because the Dewey-Burdock project cannot proceed until the EPA UIC permits are effective. Such delays are contrary to the Board's authorizing regulations, which were revised in 2020 with a view to "expediting the appeal process." 85 Fed. Reg. 51650, 51652 (August 21, 2020). Further stay of this proceeding therefore runs contrary to the underlying intent to avoid unnecessary delays in completing review Board review of permit challenges. For any project of this type, time is money as developers design a project, seek to obtain all of the necessary licenses, permits, and approvals, all while working to raise the necessary financing to support construction and implementation of the project. Any further delay of this review of the UIC permits will be extended by the anticipated appeal of any final action here denying review by a petition for review that likely would be joined with the pending petition for review of the related designation of an exempted aquifer already filed in the U.S. Court of Appeals for the 8th Circuit. *See* Joint Motion to Hold Case in Abeyance, filed in *Oglala Sioux Tribe v. EPA*, Case No. 21-1167 (8th Cir., filed Feb. 24, 2021) (Attachment D) ("Depending on the outcome of the Environmental Appeals Board proceeding, the Oglala Sioux Tribe will likely seek judicial review, which would likely be filed in this Court."). All of this further

delays implementation of a project that NRC and EPA Region 8 have already determined merits approval and construction.

Powertech has applied to the South Dakota Department of Agriculture and Natural Resources (“DANR”)⁶ Board of Minerals and Environment (“BME”) for a large-scale mining permit and to the DANR Water Management Board (“WMB”) for both water rights permits and a groundwater discharge permit. All of these permit applications were complete, and hearings commenced before both BME and WMB in 2013. Powertech must obtain all of these permits before the Dewey-Burdock project can operate. *See* RTC at 138 (“Following EPA’s issuance of a final UIC permit decision, the State of South Dakota permitting processes must still be completed before the Permittee may begin work at the project site”).

Powertech maintains that the state proceedings should resume and be completed now that NRC has issued a final and fully effective license setting the necessary surety and other parameters and the EPA has taken final administrative action to issue UIC permits setting the necessary surety and other parameters, albeit with effectiveness delayed by an appeal to the Board. Accordingly, Powertech is seeking resumption of the state permit proceedings because the applicable federal

⁶ On April 19, 2021, the South Dakota Department of Environment and Natural Resources (DENR) became the South Dakota Department of Agriculture and Natural Resources (DANR). Accordingly, the DENR department name appears on matters and documents prior to that date.

permit parameters have been established and that is sufficient to resume the permitting processes, but Powertech has no assurance of success.

On November 5, 2013, BME ordered over opposition by Powertech that its hearings and action on the large scale mining permit be suspended “until such time as the NRC and EPA have ruled and set the federal surety, and the Water Management Board has decided the allocation rights” *In the Matter of Powertech (USA), Inc. Application for Large Scale Mining Permit (Dewey-Burdock Project)*, Order dated Nov. 5, 2013 (Attachment E). Accordingly, BME has ruled that it will not act on the pending application until the EPA UIC permit terms are established.⁷

Following issuance of the BME order suspending its proceedings, WMB also ordered on November 25, 2013 “that the administrative hearing on Powertech's applications pending before the Board is continued until resolution by the federal agencies of Powertech's pending applications for the Dewey-Burdock Project set forth in this Order.” *In the Matter of Water Permit Applications 2685-2 And 2686-2, Powertech (USA), Inc. and In the Matter of the 2012 Groundwater Discharge Plan Application Submitted by Powertech (USA), Inc., Order of November 25,*

⁷ The NRC license is already final and fully effective and has not been stayed either administratively or judicially during the pendency of the appeal before the D.C. Circuit. Therefore, final action by the Board that allows the UIC permits to become final is required to meet the federal action contingency set by BME.

2013 (Attachment F). The WMB order was issued in response to a motion filed by Powertech in recognition that action by BME suspending its proceedings effectively forestalled final action to obtain all necessary state permits. As shown by the attached WMB order (Attachment G), Powertech is now seeking resumption of WMB action on its pending applications.

Although Powertech submits that sufficient action on federal permits is complete to allow the state agencies to proceed, intervenors in those actions assert that “the time is not ripe for [the WMB] to consider scheduling a restarting of hearings on Powertech's WAP and waste disposal permit applications since the federal permitting process is far from completion.” Intervenor Clean Water Alliance (CWA) Response to Motion for Status Conference 3 (April 27, 2021) (Attachment H). CWA further “contends that the record shows Powertech federal permits remain subject to pending appeals or have not reached the formal hearing stage on the merits of pending applications.” CWA, Motion for Continuance 3 (April 27, 2021) (Attachment I).

Even if Powertech is successful in obtaining resumption of the WMB proceeding previously suspended on Powertech's motion, the BME proceeding is also suspended. In sum, all proceedings in South Dakota are currently suspended pending effective EPA UIC permits with no guarantees of resumption in the face of opposition.

CONCLUSION

For the foregoing reasons, Powertech respectfully requests that the Region's Motion for Further Stay be denied and that a schedule be established to complete briefing on this petition. Powertech further submits that Petitioner's NHPA arguments can and should be dismissed because the Petition provided no explanation of why the Region's comprehensive response to Petitioner's comments on these issues was clearly erroneous and thus fails to meet the requirements of section 124.19(a)(4)(ii). *See In Re Archer Daniels Midland Co.*, 17 E.A.D. 380, 382 (EAB 2017) ("The Board consistently has denied review of petitions" under these circumstances).

Statement of Compliance with Word Limitations

In accordance with 40 C.F.R. § 124.19(f)(5), the undersigned attorneys certify that this Opposition of Powertech to Respondents' Motion For Further Stay contains fewer than 7000 words.

Respectfully submitted,

/s/ Robert F. Van Voorhees

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CERTIFICATE OF SERVICE

I hereby certify that, on May 18, 2021, I served the foregoing document on the following persons by e-mail in accordance with the Environmental Appeals Board's September 21, 2020 Revised Order Authorizing Electronic Service of Documents in Permit and Enforcement Appeals:

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