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

Powertech (USA) Inc. (“Powertech”) moves to strike the Brief Amicus Curiae of the Great Plains Tribal Water Alliance, Inc. (“Alliance”). While that brief purports to be an amicus brief supporting the petition for review of the Oglala Sioux Tribe (the “Petition”), it does not address any of the issues raised in the Petition; instead, it seeks to raise entirely new issues for review. Because Alliance’s brief serves exclusively to raise new issues rather than to assist the Board in resolving the issues presented by the Petition, it is – in substance – a late-filed petition for review that should be dismissed as such.

1

Board has held that new issues “raised at the reply stage of the[] proceedings are equivalent to late filed appeals and must be denied on the basis of timeliness.” *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 126 n.9 (EAB 1999). The same is true of new issues raised in other briefs filed after the deadline for the filing of petitions for review, including amicus briefs. *See In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 595 & n. 168 (EAB 2006) (citing cases and declining to consider arguments that were raised in an amicus brief “rather than in a timely petition”); *id.* at 626 n. 215; 651 n. 263, and 661-62 n. 286 (applying the same principle). Accordingly, the new claims raised by the Alliance’s brief are not properly before the Board and should be dismissed as untimely. Because the Alliance’s purported amicus brief addresses only these untimely claims rather than the claims raised in the Petition, the Board should strike entire amicus brief.

## **ARGUMENT**

### **A. The Alliance’s Brief Raises Distinctly Different Issues than the Petition.**

The issues raised by the Petition are whether EPA Region 8:

- Failed to demonstrate compliance with the requirements of the National Historic Preservation Act, 16 U.S.C. §§ 470, et seq. and implementing regulations;
- Failed to demonstrate compliance with the cumulative effects analysis required by 40 C.F.R. § 144.33(c)(3), the “functional equivalence” doctrine, and NEPA’s “systematic, interdisciplinary approach” to federal decisionmaking under 42 U.S.C. § 4332(2)(A);
- Failed to demonstrate compliance with the Safe Drinking Water Act and implementing regulations, including 40 C.F.R. § 144.12, 40 C.F.R. § 146.33(a), and 40 C.F.R. § 146.6(a)(ii), regarding containment of mining fluid within the exempted aquifer and protection of underground sources of drinking water; and
- Failed to comply with the procedural rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. §§ 701, et seq.

Petition at 8-9. The Alliance’s brief does not address any of these issues. Instead, it raises distinctly different issues involving Region 8’s alleged:

- “Failure to comply with the over-arching government-to-government consultation requirements of E.O. 13175 and the EPA and Region 8 Indian Policies”<sup>1</sup>; and
- “Failure to comply with agency policies on tribal consultation” in violation of 5 U.S.C. §706(2)(A).<sup>2</sup>

The entire text of the amicus brief is devoted to asserting and supporting these two specific challenges rather than any of the challenges raised in the Petition.<sup>3</sup>

#### **B. The Issues Raised by the Alliance’s Brief Should be Dismissed as Untimely.**

The Board has consistently held that new issues cannot be raised for review in filings submitted after the deadline for seeking review has passed. Such issues are “equivalent to late filed appeals and must be denied on the basis of timeliness.” *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 126 n.9 (EAB 1999); *In re Arizona Public Service Co.*, 18 E.A.D. 245, 272-73 (EAB 2020); *see also In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 219 n.62 (EAB 2000); *In re City of Ames, Iowa*, 6 E.A.D. 374 (1996) (“Because the supplementary brief raises a new issue and was filed after the Appeal period under section 124.91(a) had passed, we are denying the City’s motion for leave to file its supplementary brief.”). The same principle applies when new issues are raised in an amicus brief. *See In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. at 595 & n. 168, 626 n. 215, 651 n. 263, and 661-62 n. 286; *In re Palmdale Hybrid Power Plant*, PSD Appeal No. 11-07 (EAB April 27, 2012) (Order Denying Motion to Intervene) (“issues [that]

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<sup>1</sup> Amicus Brief at 2. In arguing this challenge, the amicus brief also appears to assert that EPA failed to comply with “consultation rights” under the Fort Laramie Treaty of April 29, 1868” (*Id.*) and with “international law requirements for consultation with the governing bodies of indigenous Tribes, for projects or policies affecting traditional or aboriginal lands” under Article 19 of the United Nations Declaration of the Rights of Indigenous Peoples. *Id.* at 5.

<sup>2</sup> *Id.* at 8.

<sup>3</sup> The amicus brief fails to mention that the issues it raises were advanced by other parties during the permitting process and specifically addressed by the Region in its Response to Comments. *See* EPA Response to Comments (Attachment 35 to the Petition) at 248-65. Nor does the amicus brief engage the Region’s responses to explain why they were clearly erroneous or would otherwise warrant review. Consequently, the amicus brief does not raise any cognizable issues at all.

should have been timely raised in a petition for review . . . may not be raised belatedly in an intervention motion, motion to participate, intervenor brief, or amicus curiae brief”).

As was true in *Dominion Energy*, the arguments the Alliance seeks to raise “could have been reasonably ascertained and raised in a timely permit appeal” but were not. *Dominion Energy*, 12 E.A.D. at 595. The Alliance failed to file its own timely petition and cannot belatedly raise its issues in an amicus brief. *Id.*

As was also the case in *Dominion Energy*, the generality of the issues raised in the Petition does not “open the door” to the “more tailored” and legally distinct arguments the Alliance seeks to raise. *Id.* (“We are not convinced by . . . arguments that the Petition, because of its great breadth, essentially opened the door to *any* issues pertaining to the Final Permit”). Nor does the fact that the Petition raised some consultation-related arguments open the door to the different and legally distinct consultation arguments the Alliance seeks to raise. *Id.* (the fact that a petition raised issues concerning “variances” did not allow *other issues* concerning “variances” to be raised in an amicus brief); see *In re City of Ames*, 6 E.A.D. 374, 388 n.22 (EAB 1996) (denying petitioner’s request to file a supplementary brief where the appeal period under section 124.91(a) had passed and the brief raised a related but “distinct” new issue).

Because it does not address any of the issues raised in a timely petition before the Board, the Alliance’s brief is, in substance, a late-filed petition for review that should be dismissed as such. Because the brief is styled as an amicus brief but does not serve the purpose of such, the Board should strike the brief in its entirety.

## CONCLUSION

For the reasons explained herein, Powertech respectfully requests that the Board strike the amicus brief as an untimely attempt to raise new issues not raised by the Petition.

### **Positions of Other Parties**

In accordance with 40 CFR § 124.19(f)(2), Powertech counsel contacted Region 8's representatives and Petitioner's attorney to ascertain whether the parties would concur or oppose this motion. Petitioner's counsel represented that the Tribe opposes this motion. Counsel for Region 8 stated that the Region opposes this motion. Counsel for the Great Plains Tribal Water Alliance, Inc. did not respond, but the Alliance is presumed to oppose this motion.

### **Statement of Compliance with Word Limitations**

In accordance with 40 C.F.R. § 124.19(f)(5), the undersigned attorneys certify that this Motion to Strike the Brief Amicus Curiae contains fewer than 7000 words.

Respectfully submitted,

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Dated: May 28, 2021

## **CERTIFICATE OF SERVICE**

I hereby certify that, on May 28, 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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