BEFORE THE 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	)	

POWERTECH'S RESPONSE TO EAB ORDER OF JUNE 30, 2023

Permittee Powertech (USA) Inc. ("Powertech") presents this response to the Environmental Appeals Board ("Board") Order of June 30, 2023 Requesting Additional Briefing.

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.

The Petition states that "petitioners present the following challenges:"

> (1) Failure to demonstrate compliance with the requirements of the National Historic Preservation Act, 16 U.S.C. §§ 470, *et seq.* and implementing regulations;
>
> (2) Failure 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. 42 U.S.C. § 4332(2)(A)).
>
> (3) Failure 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 demonstration of ability to contain the mining fluid within the exempted aquifer and protect underground sources of drinking water.
>
> (4) Failure to abide by the procedural rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. §§ 701, *et seq.*

Petition at 8-9 (Dec. 24, 2020) ("Pet.").

(1)

With respect to the first challenge, the D.C. Circuit ruled that "[t]he [Nuclear Regulatory] Commission reasonably satisfied its obligations under the NHPA's regulatory scheme." *Oglala Sioux Tribe v. U.S. Nuclear Regulatory Comm'n*, 45 F.4th 291, 306 (D.C. Cir. 2022). The Petition asserts: "Given NRC Staff's similar failure to ensure a competent cultural resources survey and analysis, EPA cannot lawfully rely on NRC Staff's legally infirm NHPA and NEPA efforts with regard to identification of cultural resources." Pet. 20. The D.C. Circuit found, however, that "[a]n agency may therefore satisfy its NHPA obligations without conducting a survey or conducting it in a specific way." 45 F.4th at 306. In its motion to stay these proceedings pending the outcome of the D.C. Circuit case, EPA Region 8 stated:

> "The D.C. Circuit challenge to the NRC action is relevant in this proceeding because in issuing the UIC permits to Powertech, the Region chose to comply with NHPA section 106 by designating the NRC as the lead federal agency for that purpose. Thus, the Region's compliance with section 106 is based on the NRC's – which is at issue in the D.C. Circuit."

EPA Region 8 Status Report and Motion for Stay of Proceedings at 2 (Apr. 19, 2021). EPA Region 8 stated further that "the Region chose to rely on the NRC's NHPA section 106 review and consultation, in accordance with an applicable regulation allowing the designation of a lead federal agency for NHPA section 106 compliance. *See* 36 C.F.R. § 800.2(a)(2).

Petitioner supported the EPA Region 8 motion to stay, arguing that "[t]he NHPA issues . . . including the lack of compliance with the NHPA, the need for cultural resource surveys, and the efficacy and legality of the Programmatic Agreement – are all directly at issue in the D.C. Circuit." Petitioner's Reply to Powertech (USA) Inc. Response in Opposition to EPA Motion to Stay Proceedings at 4 (May 28, 2021). Petitioner further asserted: "The [Petitioners']

Brief [in the D.C. Circuit] demonstrates the substantial overlap between this appeal and the D.C. Circuit case – particularly with regard to the NHPA claims." Id. at 5. Petitioner reiterated "the Region's legally supported demonstration in its original Motion that '[I]f the lead agency is in non-compliance with Section 106, so is the agency that designated it as lead.'" Id. at 4. The converse is equally true. If the lead agency is in compliance with Section 106, so is the agency that designated it as lead. The D.C. Circuit held: "The Commission reasonably satisfied its obligations under the NHPA's regulatory scheme." 45 F.4th at 306. Accordingly, the D.C. Circuit resolved the NHPA issues, and nothing regarding those issues remains for resolution by the Board.

(2)

The UIC regulations expressly preclude Petitioner's challenge under NEPA, as demonstrated in Powertech's pending Motion to Strike National Environmental Policy Act Challenges (May 18, 2021). As the Board has noted, it is "not at liberty to resolve every claim brought before us in a permit appeal but must restrict our review to conform to our regulatory mandate." *In re Envtl. Disposal Sys.*, 12 E.A.D. 254, 294 (EAB 2005). The UIC regulations at 40 C.F.R. § 124.9(b)(6) provide that UIC permits "are not subject to the environmental impact statement provisions of section 102(2)(C) of the National Environmental Policy Act." Accordingly, this challenge issue will be resolved and eliminated when the Board reaches and rules on that motion to strike and is not dependent on the D.C. Circuit decision.

(3) and (4)

The D.C. Circuit decision is not determinative for petitioner's third and fourth challenges, which remain 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.

The post-decisional cultural resources survey protocol developed by NRC in September 2021 for the Crow Butte Resources Inc. facility in Dawes County, Nebraska is not relevant to the decision by EPA Region 8 when it adopted the NRC analysis in making the November 24, 2020 decision to issue permits to Powertech. That protocol was developed for a completely separate project with a different licensee in a different state.

First, as discussed in more detail in response 4 below, post-decisional documents such as this are not eligible for addition to the administrative record and could not have played any role in the decisions under review here. Second, the D.C. Circuit has already ruled in NRC's favor regarding this project, and upheld the determination that NRC satisfied its NEPA and NHPA obligations. *Oglala Sioux Tribe v. NRC*, 45 F.4th at 301. Third, the challenged UIC permits ultimately protect any cultural resources, since all ground-disturbing activities within 150 feet of any area of discovery of previously unknown cultural resources must halt or minimize impacts until the property is evaluated for listing on the National Register of Historic Places by qualified personnel, among other protections. Class III Injection Well Area Permit Dewey-Burdock Uranium In-Situ Recovery Project Custer and Fall River Counties, South Dakota, Part XIV(A)(4) (Area Permit No. SD31231-00000, Nov. 24, 2020); Class V Deep Injection Well Area Permit Dewey-Burdock Uranium In-Situ Recovery Project Custer and Fall River Counties, South Dakota, Part IX(A)(4) (Area Permit No. SD52173-00000, Nov. 24, 2020). Here, the D.C. Circuit opinion is helpful in its discussion of NRC's NEPA approach to rely on future actions by noting:

> [A]n agency does not run afoul of NEPA when it adequately analyzes mitigation measures and then provides that it will continue to develop those plans . . . And where, as here, the agency carefully analyzes environmental impacts and ways to reduce or avoid those impacts, additional efforts to mitigate impacts in the future would seem to further the purposes of NEPA, rather than to constitute a procedural violation.

45 F.4th at 305-06. The same can be said for further NHPA reviews and responses. NRC's post-decisional 2021 cultural resource survey protocols for the Crow Butte Resources Inc. facility in Dawes County, Nebraska ultimately provide no basis for Petitioner to supplement its Petition challenging the 2020 EPA's UIC permit decisions for the Dewey-Burdock Project.

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, LLC*, 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).

Consideration of the November 2022 Fall River County local ordinance is not at all consistent with either the UIC regulations or Board precedent. Under 40 C.F.R. § 144.35(c) the UIC permits issued to Powertech have no bearing whatsoever on compliance with state and local laws. "The UIC permitting process, however, 'is narrow in its focus and the Board's review of the UIC permit decisions extends only to the boundaries of the UIC permitting program, which is limited to the protection of underground sources of drinking water.'" *In re Sammy-Mar, LLC*, 17 E.A.D. 88, 98 (EAB 2016) (concluding local law matters are outside the scope of the Board's review authority); *In re Envtl. Disposal Sys.*, 12 E.A.D. 254, 266-67 (EAB 2005) (local ordinances "flow from decisions made at the state or local levels pursuant to state or local laws, and not from requirements of the SDWA UIC program"). "EPA is simply not the correct forum for litigating [such] disputes that may happen to arise in the context of waste disposal activity for which a federal permit is required. These disputes properly belong in a court of competent jurisdiction." *In re Suckla Farms, Inc.*, 4 E.A.D. 686, 695 (EAB 1993).

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, 124.18(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).

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) does not comport with, would indeed be contrary to the regulations as explained by the Board. *In re Gen. Elec. Co.*, 18 E.A.D. 575, 610-11 (EAB 2022). As noted there, the Board has established only two instances for allowing parties to supplement the administrative record: (1) material that must be included in the administrative record, 40 C.F.R. § 124.18(b)(1)-(7), or (2) material the agency relied upon, but failed to include in the administrative record. The post-decisional materials presented here satisfy neither. *Id*. at 610. The Board provided two reasons, based upon the very nature of post-decisional information, why this is so :

> First, it cannot be required administrative record material under the regulations because the regulations specify that the record closes when the permit is issued, 40 C.F.R. § 124.18(c). Second, the Agency cannot possibly have relied upon post-decisional material in its permitting decision because such material would have come to the Agency's attention after the permitting decision was already made.

Id. For these reasons, the Board has been "very reluctant to consider post-decisional documents," and rejected adopting a liberal approach to allowing post-decisional material as "reflect[ing] a flawed understanding of the basic principles of administrative record review." *Id*. (citing *In re Town of Newmarket, N.H.,* 16 E.A.D. 182, 241 (EAB 2013)).

Allowing Petitioner to supplement its petition in this case with such post-decisional material would be contrary to these same principles. *See In re Gen. Motors Corp*., 5 E.A.D. 400, 405 (EAB 1994) (stating that supplementation of data provided after permit issuance "would be

to invite unlimited attempts by permittees to reopen and supplement the administrative record after the period for submission of comments has expired").

Furthermore, as Powertech noted in its Response in Opposition to Petitioner's Motion to Amend Petition at (May 8, 2023), Petitioner acknowledges that the matters described in the "three regulatory reports" are only "proposals" for future expansions of operations. Such changes would require new rounds of permitting actions by EPA and Wyoming. Each such action would result in a new agency decision supported by a new administrative record.

Conclusion

Based on the foregoing responses to the June 30, 2023 Order Requiring Additional Briefing, the Board should deny Petitioner's Motion to Amend Petition in all respects.

Statement of Compliance with Word Limitations

In accordance with the Board Order of June 30, 2023, the undersigned attorneys certify that this Response to Motion of Petitioner to Amend Petition does not exceed ten pages.

Respectfully submitted,

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Dated: July 28, 2023

CERTIFICATE OF SERVICE

I hereby certify that, on July 28, 2023, 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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