BEFORE THE ENVIRONMENTAL APPEALS BOARD

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re: Powertech (USA) Inc. Permit No. SD31231-0000 and SD52173-0000	UIC Appeal No. 20-01

ADDITIONAL BRIEFING BY EPA REGION 8

In accordance with the June 30, 2023 Order of the Environmental Appeals Board, Environmental Protection Agency (EPA) Region 8 submits this additional briefing on four issues.

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 final and unappealable *Oglala Sioux Tribe* decision resolves one of the major issues in this matter: the Region's compliance with the National Historic Preservation Act (NHPA). Allegations that EPA failed to comply with the NHPA are a significant part of the Petition for Review in this matter, and of the proposed Supplemental Petition. But to comply with the NHPA, and as authorized by the applicable NHPA regulations, EPA legally relied on the work of the Nuclear Regulatory Commission (NRC). Now, in the *Oglala Sioux Tribe* decision, the D.C. Circuit has fully and finally upheld that NRC work. Accordingly, as more fully explained below, Petitioner's NHPA-based claims should be denied.

Summary of Petitioner's NHPA-Based Arguments

The Petition in this matter asserts four bases for granting review of the Region's permitting decisions. *See* Petition at 2. Of these, the first is that "EPA Region 8's Decisions Violate the National Historic Preservation Act," by failing to comply with the NHPA section 106 mandate that federal agencies consider the effects of their undertakings on historic properties and consult with interested Indian tribes in the process. Petition at 14-16; *see generally* Petition at 14-22. Petitioners allege that the Region "failed to comply with the consultation and historic resources protection requirements of the NHPA" because it relied on the "incompetent" and "discredited" survey efforts of NRC, and because it "simply signed on to the Programmatic Agreement (PA) developed by NRC Staff." Petition at 16-18.

Background: Relevant NHPA and Regulatory Requirements

Section 106 of the NHPA requires federal agencies to take into account the effects of their undertakings on historic properties. 54 U.S.C. § 306108. Regulations promulgated by the Advisory Council on Historic Preservation (ACHP) establish procedures for federal agencies to follow in order to comply with NHPA section 106. 36 C.F.R. § 800.1; *see generally* 36 C.F.R. part 800. The Dewey-Burdock Project is an NHPA "undertaking" because it is a project requiring federal permits, licenses, and approvals, including EPA Underground Injection Control (UIC) permits and an aquifer exemption, as well as an NRC license. 36 C.F.R. § 800.16(y). An undertaking can involve multiple federal agencies, and agencies involved may designate a "lead Federal agency" for NHPA section 106 compliance. 36 C.F.R. § 800.2(a)(2).[1] The lead agency's

[1] "*Lead Federal agency*. If more than one Federal agency is involved in an undertaking, some or all the agencies may designate a lead Federal agency, which shall identify the appropriate official to serve as the agency official who shall act on their behalf, fulfilling their collective responsibilities under section 106. Those Federal agencies that do not designate a lead Federal agency remain individually responsible for their compliance with this part." The lead agency regulation was promulgated in the ACHP's 1999 revisions to the section 106 regulations. Protection of Historic Properties, 64 Fed. Reg. 27044, 27071-72 (May 18, 1999).

compliance satisfies the designating federal agencies' "collective responsibilities under section 106." *Id.*

EPA Designation of NRC as Lead Federal Agency

In accordance with 36 C.F.R. § 800.2(a)(2), and after inviting and considering public comments, EPA designated NRC as the lead agency for NHPA compliance. *See* Attachment 1, Response to Comments (Excerpt), at 309-312; Status Report and Motion for Stay of Proceedings at 3.[2] After assigning this lead role to NRC, the Region issued the final permits and the response to comments. Explaining the designation to the public, the Region stated that "[h]aving a single agency serve as the lead, with input from other agencies as appropriate, promotes efficiency in government," and that EPA had concluded that "a separate, parallel NHPA compliance effort would not meaningfully alter the protection of historic properties in connection with this undertaking." Attachment 1, Response to Comments (Excerpt), at 310-311. An appendix to the Programmatic Agreement includes information on field surveys conducted in connection with the project, and describes cultural resources identified within and adjacent to the boundary of the 10,580-acre project site. Attachment 3, Programmatic Agreement Appendix B.

The Region's designation of NRC as the lead agency meant that EPA's permitting action would comply with the NHPA if NRC's NHPA process did. As the ACHP has explained, "if the lead agency correctly complies with Section 106, the non-lead agency is also in compliance with Section 106." Frequently Asked Questions About Lead Federal Agencies in Section 106 Review, available at https://www.achp.gov/sites/default/files/2018-06/LFA-FAQ-2018_0.pdf; *see also* synopsis available at https://www.achp.gov/digital-library-section-106-landing/frequently-asked-questions-about-lead-federal-agencies.

[2] *See also* Attachment 2, Programmatic Agreement. Agencies may develop programmatic agreements to govern "the resolution of adverse effects from certain complex project situations." 36 C.F.R. § 800.14(b).

Effect of D.C. Circuit holding

Petitioner Oglala Sioux Tribe challenged NRC's compliance with the NHPA in the D.C. Circuit, arguing that NRC had "failed to satisfy the substantive and procedural duties…required by the National Historic Preservation Act." Attachment 4, Petitioners' Statement of Issues to be Raised, *Oglala Sioux Tribe v. U.S. Nuclear Regulatory Comm'n*, No. 20-1489 (D.C. Cir. Jan. 11, 2021). In particular, the Tribe asserted that NRC had not adequately consulted with it as required under the NHPA, that NRC had failed to survey the project area for the Tribe's historic properties, and that NRC had impermissibly postponed identifying historic properties until after commencement of operations by Powertech. *Oglala Sioux Tribe*, 45 F.4th at 306. Finding against the Tribe, the court held that NRC had "satisfied its consultation obligations under the NHPA"; that NRC was not required to conduct the field survey requested by the Tribe; and that NHPA regulations "expressly contemplate" the phased approach to identifying historic properties that NRC followed. *Id.* Accordingly, the court held that NRC "reasonably satisfied its obligations under the NHPA's regulatory scheme." *Id.*

Under the doctrine of collateral estoppel, the final and unappealable decision in *Oglala Sioux Tribe* should be treated as dispositive on the issue of EPA's compliance with the NHPA. Collateral estoppel, or issue preclusion, "precludes a party from relitigating an issue actually decided in a prior case and necessary to the judgment." *Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp., Inc.*, 140 S. Ct. 1589, 1594 (May 14, 2020). Here, as explained above, the issue of NRC's compliance with the NHPA was litigated before the D.C. Circuit and was decided as a part of the final judgment. *See Oglala Sioux Tribe*, 45 F.4th at 306. "Findings against particular plaintiffs on issues in one action should, under the doctrine of collateral estoppel, bind the same plaintiffs in the other action." *Span-Eng Assocs. v. Weidner*, 771 F.2d 464, 468-69 (10th Cir. 1985) (citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), and *Blonder-Tongue Labs., Inc. v. Univ. of Illinois Found.*, 402 U.S. 313 (1971)). As the petitioner in the D.C. Circuit action,

the Tribe had a "full and fair opportunity" to litigate the question of NRC's compliance with the NHPA, and it is therefore precluded from rearguing that issue in this forum. See *Parklane Hosiery Co.*, 439 U.S. at 332-33 (holding that collateral estoppel "inescapably" bound petitioners who had a "'full and fair' opportunity to litigate their claims" in prior action).

Even if the issue had not already been litigated and decided in the D.C. Circuit, a challenge to the validity of NRC's compliance with the NHPA before this Board would be inappropriate given that the Board has declined to review other federal agencies' actions in similar circumstances. "To the extent petitioners raise issues regarding alleged deficiencies with BLM's EIS process under NEPA, this Board must deny review, as review is appropriately left to BLM and its administrative process." *In re American Soda, LLP*, 9 E.A.D. 280, 289 (EAB 2000). Similarly, the Board declined to consider a challenge to the U.S. Fish and Wildlife Service's compliance with the Endangered Species Act: "Plainly, challenges to the actions of the FWS belong in a different forum; the Board does not have jurisdiction to review the Service's decisions. Such concerns should have been pursued as a separate Administrative Procedure Act … challenge to the FWS's decisionmaking." *In re Indeck-Elwood, LLC*, 13 E.A.D. 126, 211 (EAB 2006).

In upholding NRC's NHPA compliance, the D.C. Circuit also necessarily upheld EPA's compliance. The Region acknowledges that this conclusion depends on the validity of the lead agency procedure established in the ACHP regulations at 36 C.F.R. 800.2(a)(2). But neither the Petition nor the proposed Supplemental Petition argues that this regulation is illegal, and in any case the Board "declin[es] to review challenges to underlying regulations in the context of administrative permit appeals." *In re Peabody Western Coal Company*, 15 E.A.D. 757, 768 (EAB 2013). Nor has the Petitioner argued that EPA failed to comply with 36 C.F.R. § 800.2(a)(2). Petitioner does not reference 36 C.F.R. § 800.2(a)(2) in the Petition or proposed Supplemental Petition, even though EPA clearly identified this regulatory basis for its approach

to NHPA compliance: "EPA's signature on the PA is sufficient to establish the Agency's compliance with the NHPA. See PA at 10 (stipulation 7); 36 C.F.R. §§ 800.2(a)(2), 800.14(B)." Attachment 1, Response to Comments (Excerpt), at 311. By omitting any reference to the lead agency regulation in either its comments during the two public notices or in its petition for review, the Tribe has failed to preserve the argument that the Region erred in designating NRC as the lead agency and failed to present a timely appeal. *See In re Scituate Wastewater Treatment Plant*, 12 E.A.D. 708, 724 (EAB 2006) ("By failing to raise the argument in its comments on the draft permit, Scituate failed to preserve the argument for review on appeal. Furthermore, by failing to raise the argument in its petition, Scituate failed to present a timely appeal on this issue."); 40 C.F.R. § 124.19(a)(4)(ii) (if issue was addressed in response to comments document, 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").

Therefore, in deciding this matter, the Board should uphold the Region's compliance with the NHPA. Because NRC's section 106 compliance as the lead agency has also fulfilled EPA's section 106 responsibilities, EPA has complied with NHPA section 106 in issuing the UIC permits.[3] Accordingly, the appropriate application of the D.C. Circuit decision to this matter would be to decide the first issue raised in the Petition ("EPA Region 8's Decisions Violate the National Historic Preservation Act") in EPA's favor without further briefing, or to strike the

[3] Petitioner also makes a brief and general statement concerning a different NHPA provision: "In addition to Section 106 NHPA duties, Section 110 imposes responsibilities on EPA to ensure a proper identification and evaluation of cultural resources." Petition, Attachment 2 at Bates #0009 (cited in Petition at 22). It is unclear whether Petitioner is arguing that EPA has violated section 110. Other than stating that "[t]hese duties cannot be dispensed with simply through attempts to contact the Tribe in the Section 106 consultation context," neither the Petition nor its Attachment 2 describe these purported responsibilities or identify any specific failure to comply with them. But in any case, "Section 110 *does not affirmatively mandate* the preservation of historic buildings or other resources" and only requires an agency "to comply to the fullest extent possible with, and in the spirit of, the Section 106 consultation process." *Oglala Sioux Tribe v. U.S. Army Corps of Eng'rs*, 537 F. Supp.2d 161, 173 (D.D.C. 2008) (emphasis in original; quoting *Nat'l Trust for Historic Pres. v. Blanck*, 938 F. Supp. 908, 925 (D.D.C. 1996)).

relevant portions of the Petition, or to otherwise act under the Board's 40 C.F.R. 124.19(n) authority so as to prevent the unnecessary consumption of the Board's and the parties' resources by considering issues related to the Region's NHPA compliance. Further, as to Petitioner's Motion to Amend Petition for Review, Issue I in the proposed "Supplemental Petition for Review" is another form of argument concerning the Region's NHPA compliance, and likewise should not be considered by the Board.

Issues Remaining for Resolution by the Board after D.C. Circuit Decision

In response to the Board's request for briefing concerning issues remaining for resolution, the Region notes that the issues raised in the Petition[4] concerning EPA's compliance with the Safe Drinking Water Act (Petition at 34-45) and the Administrative Procedure Act (Petition at 45-52) are not directly affected by the *Oglala Sioux Tribe* decision. Similarly, while that decision upheld the NRC's compliance with the National Environmental Policy Act (NEPA), it did not address the SDWA NEPA functional equivalence issues raised in the petition. (Petition at 23-33).

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.

With or without the *Oglala Sioux Tribe* decision, the Crow Butte cultural resources survey protocol is outside the administrative record and irrelevant to this matter. Petitioner argues that it is a "significant event[]" that "in the intervening almost two and half years [since the Petition was filed], the U.S. Nuclear Regulatory Commission and its professional staff have jointly developed and endorsed, in conjunction with the Oglala Sioux Tribe, a cultural resources survey protocol." Motion to Amend Petition for Review at 1. But the protocol developed for the Crow

[4] For the reasons explained above and in the Region's response to the Motion to Amend Petition for Review, the proposed Supplemental Petition, even if allowed, would not raise any additional issues requiring resolution by the Board.

Butte Resources facility has nothing to do with this action. The asserted relevance is that the development of this protocol (for a different project) "demonstrates that the information related to cultural resources is not 'unavailable' as Region 8 EPA's decision effectively asserted when adopting the U.S. Nuclear Regulatory Commission Staff's analysis and issuing the UIC licenses at issue in this case." Motion to Amend at 1. As the Region has explained, this assertion mischaracterizes the basis for the Region's action. EPA Region 8 Response to Petitioner's Motion to Amend Petition for Review at 6-7. Contrary to Petitioner's assertion, the Region did not base any aspect of its decision in this matter on cultural resource issues related to the Crow Butte Resources facility in Nebraska. More fundamentally, the Region did not "effectively" or otherwise base any aspect of its decision concerning NHPA compliance on the unavailability of information related to cultural resources at *any* facility. Instead, as explained above, the Region complied with the NHPA by designating NRC as the lead agency, in accordance with 36 C.F.R. 800.2(a)(2).

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).

As Region 8 argued in its Response to Petitioner's Motion to Amend Petition for Review, the Board should not consider the November 2022 local ordinance referenced in the Tribe's Motion to Amend Petition for Review, because it is outside the scope of the federal UIC program. The ordinance is exactly the kind of state or local law that the Board has previously determined to be outside the scope of its jurisdiction. *See* Region 8 Response to Petitioner's Motion to Amend Petition for Review, p. 8 (string cite of cases decided by the Board affirming this scope of review).

In re Sammy-Mar, L.L.C., 17 E.A.D. 88, 98 (EAB 2016) and *In re Federated Oil & Gas*, 6 E.A.D. 722, 725 (EAB 1997) are consistent with the EAB cases Region 8 cited in its Response

on the effect of state and local laws on UIC permitting. Both cases explain that the Board's review is narrow in focus and limited only to the Safe Drinking Water Act and protection of underground sources of drinking water. *See In re Sammy-Mar* at 98; *In re Federated Oil & Gas* at 725-726. Further, as the Board pointed out in *In re Sammy-Mar*, "even though these local matters are outside the scope of the Board's review authority, Sammy-Mar must still comply with all applicable state and local laws and regulations…. Indeed, the Permit makes clear that it 'does not convey property rights or mineral rights of any sort or any exclusive privilege; nor does it authorize any injury to persons or property, any invasion of other property rights, or any infringement of State or local law or regulations.'" 17 E.A.D at 98. This language is also in the regulations at 40 C.F.R. § 144.35(b), (c). Both the Class III and Class V permits in this case incorporate these regulatory concepts; specifically, Part I of each permit states, "Issuance of this Permit does not convey property rights of any sort or any exclusive privilege; nor does it authorize any injury to persons or property, any invasion of other private rights, or any infringement of State or local law or regulations…. Nothing in this Permit relieves the Permittee of any duties under applicable State or laws or regulations." Attachment 5, Final Class III Area Permit (Excerpt) Document #109 at p. 1, Final Class V Area Permit (Excerpt) Document #281 at p. 1. This case is not distinguishable from the Board decisions cited above and in Region 8's Response to Petitioner's Motion to Amend; therefore, the November 2022 Fall River County ordinance falls outside the scope of the Board's jurisdiction.

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).

Board consideration of the three technical reports identified by the Tribe in its Motion to Amend would not be consistent with the regulations at 40 C.F.R. §§ 124.9 and 124.18. As

Region 8 points out in its Response to Petitioner's Motion to Amend Petition for Review, these documents were filed *after* EPA issued the UIC permits. The Region issued the final permits on November 24, 2020. The documents cited by the Tribe are dated December 23, 2020, May 10, 2021, and August 10, 2021. As specified by 40 C.F.R. § 124.18(c), "[t]he record shall be complete on the date the final permit is issued."

The Board describes in *In re Gen. Elec. Co.* the limited instances where it may allow for supplementation of the administrative record. 18 E.A.D. at 610-11. This includes: (1) when documents fall into a category of material that must be included in the administrative record per 40 C.F.R. § 124.18(b), and (2) if the Agency relied on the material in its final permitting decision but failed to include them in the certified administrative record. *Id.* But as the Board points out, "[p]ost-decisional material, by its nature, cannot satisfy either criterion for supplementing the record. *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.*

The three technical reports are not required to be in the administrative record per 40 C.F.R. § 124.8, nor did the Region rely on these documents in its final permitting decisions. These documents were created after the Region's permitting decision, and such post-decisional material cannot satisfy either criterion for supplementing the record.

Date: July 28, 2023

Respectfully submitted,

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STATEMENT OF COMPLIANCE WITH WORD AND PAGE LIMITATIONS

In accordance with 40 C.F.R. § 124.19(f)(5) and with the Board's Order Requiring Additional Briefing, I certify that this Additional Briefing by EPA Region 8 does not exceed 7000 words, nor (exclusive of signature and certification pages) does it exceed ten pages.

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CERTIFICATE OF SERVICE

I certify that the foregoing Additional Briefing by EPA Region 8 in the matter of Powertech (USA) Inc., UIC Appeal No. 20-01, was filed electronically with the Environmental Appeals Board's E-filing System and served by email on the following persons on July 28, 2023.

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