

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

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In re:)	
)	
Powertech (USA) Inc.)	
)	UIC Appeal No. 25-01
Permit Nos. SD31231-00000 & SD52173-)	
00000)	
)	

**MOTION TO STRIKE AND ALTERNATIVE MOTION FOR LEAVE TO FILE
SURREPLY**

Powertech (USA) Inc. (“Powertech”) moves to strike a new argument raised by the Oglala Sioux Tribe, Black Hills Clean Water Alliance, and NDN Collective (“Petitioners”) for the first time in their reply brief. In the alternative, Powertech moves for leave to file a surreply in response to the new argument raised and new legal issues that necessarily flow from that new argument.

Specifically, Petitioners for the first time in their reply argue that Andrew Catt-Iron Shell, a current member of NDN Collective staff, made public comments at a 2019 hearing that satisfy NDN Collective’s threshold requirements for participation in this proceeding. Introduction of this new argument necessarily raises new legal issues that have not been briefed including: (1) whether an organization can satisfy its threshold requirements when a member or staff participates in a hearing but does not identify himself as a member or staff of the organization and (2) if so, whether the organization can still satisfy its threshold requirement when the member or staff that participated in a hearing was not a member or staff of the organization until

several months after the applicable hearing in which he participated. This new argument was reasonably ascertainable when Petitioners filed their petition on April 11, 2025.

The regulations governing permit appeals specify that in the petition, “Petitioners must demonstrate, by providing specific citation to the administrative record, *including the document name and page number*, that each issue being raised in the petition was raised during the public comment period.” 40 C.F.R. § 124.19(a)(4)(ii) (emphasis added). Further, a “Petitioner may not raise new issues or arguments in the reply.” 40 C.F.R. § 124.19(c)(2). The Environmental Appeals Board (“Board”) has routinely held that new arguments and new issues may not be raised in reply briefs, as they are the equivalent of a late-filed appeal. *See, e.g., In re City of Keene*, 18 E.A.D. 720, 746 (EAB 2022); *In re Arizona Public Service*, 18 E.A.D. 245, 272-73 (EAB 2020); *In re City of Taunton, Department of Public Works*, 17 E.A.D. 105, 183 (EAB 2016); *In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 595 (EAB 2006).

I. The Board Should Strike Petitioners’ New Threshold Requirement Argument or, in the Alternative, Grant Leave for Powertech to File a Surreply

A. The New Argument Should be Stricken Because it is Untimely

As a threshold requirement for participation in an appeal before the Board, a petitioner must demonstrate that it “filed comments on the draft permit or participated in a public hearing on the draft permit.” 40 C.F.R. § 124.19(a)(2). In their petition, in support of NDN Collective’s satisfaction of this threshold requirement, Petitioners asserted only that “Members and staff of NDN Collective participated in the October 5, 2019 public hearing on the draft permits held by EPA in Hot Springs, SD (transcript located at Administrative Record Document #659).” Petition for Review of Oglala Sioux Tribe, Black Hills Clean Water Alliance, and NDN Collective at 6 (April 11, 2025) (“Petition”). The Petition did not identify particular individuals that participated

in the hearing that were purported to be affiliated with NDN Collective, nor did it cite to particular page numbers within the transcript that could have been used by other parties to identify such individuals.

Nonetheless, Powertech scoured the entire 258 page transcript of that hearing and failed to identify any individual purporting to speak on behalf of NDN Collective or otherwise be affiliated with NDN Collective. *See* Response of Powertech (USA) Inc. to Petition for Review at 9 (May 12, 2025) (“Powertech Response”). Further, as pointed out in the Powertech Response, Petitioners’ failure to identify the relevant comments does not provide the level of specificity demanded by 40 C.F.R. § 124.19(a) and by Board precedent. Powertech Response at 9-10. EPA Region 8 also contested NDN Collective’s standing on the basis that it did not file public comments or participate in the October 2019 hearing. EPA Region 8’s Response to Petition for Review at 40-41 (May 9, 2025) (“EPA Response”).

Petitioners attempted to cure this defect in their reply by, for the first time, arguing that an NDN Collective staff member named Andrew Catt-Iron Shell participated in the October 2019 hearing. Petitioners’ Reply at 6 (June 12, 2025) (“Petitioners’ Reply”). In their reply, Petitioners attempted to turn back time and change history by adding two brand new citations not previously included anywhere in the record. *Id.* Specifically, Petitioners stated,

Further, contrary to both Powertech’s and the Region’s arguments, NDN Collective staff attended and commented during public hearings on the draft permits on October 5, 2019. *See* Petition at 6, citing transcript at AR Doc. #659, pp. 33:10-36:2 (public comments of Andrew Catt-Iron Shell, NDN Collective staff); *see also* Affidavit of Andrew Catt-Iron Shell (attached).¹

Id.

¹ Powertech notes that in making this statement Petitioners have abandoned their argument in the Petition that “members and staff” of NDN Collective participated in the October 2019 hearing. Petition at 6. Instead Petitioners now assert that only a single individual that has since joined NDN Collective staff participated in that hearing.

First, Petitioners attempt to amend their citation to the October 5, 2019 hearing transcript in the Petition by claiming it cited to pp. 33:10-36:2 when in reality no such citation existed in the Petition. This attempted sleight of hand cannot rectify the Petition's failure to meet the basic legal requirements demanded of it. Second, Petitioners introduced an affidavit to further support the claim that Andrew Catt-Iron Shell is both on staff at NDN Collective and commented in the October 2019 hearing.

Each of these new arguments, designed to cure clear legal defects in the Petition, should be stricken because their late introduction is tantamount to an untimely filed petition. *See, e.g., In re City of Keene*, 18 E.A.D. 720, 746 (EAB 2022). Further, these late additions clearly prejudice Powertech because the arguments raise new issues, discussed further below, that Powertech has not been afforded an opportunity to brief.

B. The New Arguments Should Be Stricken or, in the Alternative, Powertech Should be Granted Leave to File a Surreply Because the Arguments Necessarily Raise Legal Issues That Have Not Been Briefed.

The new argument discussed above raises two critical new legal issues that will prejudice Powertech if it is not stricken or Powertech is not allowed to fully brief the issues. First, Powertech has not been afforded an opportunity to brief the issue as to whether a person that comments at a hearing but does not identify himself as a member or staff of an organization at that hearing meets the threshold requirement that the organization must have commented at the hearing. Powertech and EPA Region 8 both timely noted that the transcript of the October 2019 hearing makes no reference to NDN Collective, and Petitioners have not disputed this fact.

The EPA Response did state that "Petitioners should be precluded from later claiming they participated on behalf of the NDN Collective when they did not identify themselves as such at the time they submitted the comment." EPA Response at 41. Powertech did not directly make

this argument because, on its face, there was no argument to be made. Petitioners did not, prior to the reply, provide evidence that anybody affiliated with the NDN Collective participated in the hearing.

Petitioners' new argument also raises a second yet-to-be-briefed legal issue as to whether a party that was not affiliated with an organization at the time he commented at a hearing can satisfy that organization's threshold requirement if he later is hired by that organization prior to commencing litigation. Petitioners worded the affidavit very carefully. It states that Mr. Catt-Iron Shell is "employed as staff for NDN Collective" and it states that Mr. Catt-Iron Shell "attended the public hearing hosted by the U.S. Environmental Protection Agency in Hot Springs, South Dakota on October 5, 2019 regarding the proposed Dewey Burdock underground injection control permits and provided public comments to the agency at the time." Affidavit of Andrew Catt-Iron Shell at pp. 2, 4 (June 12, 2025) ("Affidavit"). Critically, the Affidavit does not state that NDN Collective employed Mr. Catt-Iron Shell as staff at the time he made his October 5, 2019 comments. There is good reason for this. In April 2020, NDN Collective published a newsletter in which it identified Mr. Catt-Iron Shell as one of three "New Members of the NDN Collective Team." *See* NDN Collective Issue #04/2020, *available at* <https://ndncollective.org/newsletters/april-2020-newsletter/> (Attachment 1). This newsletter appears to show that Mr. Catt-Iron Shell was not employed by NDN Collective until sometime in March or April of 2020, five to six months after the hearing in question.

Powertech will be prejudiced if the Board allows Petitioners to proceed with the argument that Mr. Catt-Iron Shell satisfies NDN Collective's threshold requirement for participation without first granting an opportunity for the parties to brief the issues. As a result, the Board should strike the Affidavit and the citations in Petitioners' Reply that seek to introduce

evidence of Mr. Catt-Iron Shell's participation in the October 2019 hearing. Alternatively, if the Board does not grant the motion to strike, it should grant Powertech leave to file a surreply so that the Board has the benefit of a full understanding of the legal implications of Petitioners' new argument.

Conclusion

For the foregoing reasons the Board should strike the Affidavit and references to Andrew Catt-Iron Shell in Petitioners' Reply. Alternatively, the Board should grant Powertech leave to file a surreply to address the new legal issues raised by the introduction of the new argument regarding Mr. Catt-Iron Shell.

Respectfully submitted,

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Dated: July 11, 2025

POSITIONS OF OTHER PARTIES

In accordance with 40 C.F.R. § 124.19(f)(2), Powertech counsel contacted counsel for EPA Region 8 and Petitioners to ascertain whether the parties would concur or oppose this motion to strike. Powertech represented that the motion would seek to strike the new arguments raised regarding the ability of Mr. Catt-Iron Shell's declaration to satisfy NDN Collective's threshold requirements. Powertech further represented that the motion for leave to file a surreply would seek to address the legal issues described in Section I.B herein. EPA Region 8 counsel indicated that they do not object to the motion. Petitioners' counsel represented that they would object to the motion to strike but, in the event the motion to strike is not granted, would not object to the motion for leave to file a surreply.

STATEMENT OF COMPLIANCE WITH WORD LIMITATION

In accordance with 40 C.F.R. § 124.19(f)(5), the undersigned attorneys certify that this motion contains fewer than 7000 words.

TABLE OF ATTACHMENTS

1. Copy of NDN Collective April 2020 Newsletter

CERTIFICATE OF SERVICE

I certify that the foregoing RESPONSE OF POWERTECH (USA) INC. TO PETITION FOR REVIEW in the matter of Powertech (USA) Inc., Appeal No. UIC 25-01, was filed electronically with the Environmental Appeals Board's E-filing System and served by email on the following persons on July 11, 2025.

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