

**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

JOINT STATUS REPORT

On June 10, 2021, the Environmental Appeals Board granted the Environmental Protection Agency Region 8's Motion to Stay in the above-captioned case. EPA Region 8 requested the stay in light of the potential for this action to be affected by litigation pending in the D.C. Circuit Court of Appeals in *Oglala Sioux Tribe v. U.S. Nuclear Regulatory Comm'n*, No. 20-1489. In that litigation, the Oglala Sioux Tribe was challenging the Nuclear Regulatory Commission's issuance of a license for the Dewey-Burdock uranium mining project, in part based on arguments that the Commission had not adequately complied with applicable National Historic Preservation Act (NHPA) requirements. EPA Region 8 represented to the Board that "the final D.C. Circuit decision as to the sufficiency of NRC's NHPA compliance would have a significant effect on these proceedings." Status Report and Motion for Stay of Proceedings at 4 (Apr. 19, 2021).

In response, the Board stayed this matter, subject to conditions, "until such time as the D.C. Circuit renders a decision disposing of the challenge to NHPA compliance in connection

with the Dewey-Burdock Project that is pending before the Court.” Order Granting Motion to Stay Subject to Conditions at 5 (June 10, 2021). The Board directed the parties to “apprise the Board within two weeks of any decision by the D.C. Circuit relevant to the NHPA issue or other issues potentially affecting the Board adjudication of the pending petition,” and in that event to “recommend next steps for orderly resolution of the present petition.” *Id.* at 6.

On August 9, 2022, the D.C. Circuit Court of Appeals issued a decision in *Oglala Sioux Tribe, et al. v. U.S. Nuclear Regulatory Comm’n*, 45 F.4th 291 (D.C. Cir. 2022). In an order issued the same day as the decision, the D.C. Circuit also ruled that it will not issue the mandate in *Oglala Sioux Tribe* “until seven days after disposition of any timely petition for rehearing or petition for rehearing en banc.” Under the Federal Rules of Appellate Procedure (FRAP), any party may file a petition for panel rehearing or rehearing en banc within 45 days after entry of judgment. FRAP 35(c); 40(a)(1). Further, any party to that litigation may seek a stay of the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. FRAP 41(d).

In accordance with the Board’s June 10, 2021 Order, on August 22, 2022, the parties submitted a Joint Report and Recommendations to the Board updating the Board about the D.C. Circuit’s decision and order. Based on the parties’ Joint Report and Recommendations, the Board issued an Order Extending Stay Subject to Conditions on August 25, 2022. In its August 25, 2022 Order, the Board ordered that:

This matter continues to be stayed. The parties are hereby directed to file a report with the Board within seven days after any of the following events: 1) issuance of the mandate in the D.C. Circuit matter; 2) filing of any petition for rehearing in the D.C. Circuit matter; 3) filing of any motion to stay the mandate in the D.C. Circuit matter

pending the filing of a petition for a writ of certiorari; 4) resolution of any petition for rehearing or motion to stay the mandate in the D.C. Circuit matter.

August 25, 2022 Order at 2-3.

On September 23, 2022, the petitioners filed a motion for rehearing en banc with the D.C. Circuit. On December 19, 2022, the parties to this action filed the Sixth Joint Status Report to inform the Board that the D.C. Circuit denied the Oglala Sioux Tribe's petition for rehearing en banc in accordance with the Board's August 25, 2022 Order, the parties filed a Seventh Joint Status Report to inform the Board that the Clerk of the Court issued a formal mandate on December 21, 2022. On January 4, 2023, the parties filed Recommendations, pursuant to the Board's June 10, 2021 Order directing the parties to "recommend next steps for orderly resolution of the present petition" in the event of a decision in *Oglala Sioux Tribe v. U.S. Nuclear Regulatory Comm'n*, then pending in the U.S. Court of Appeals for the District of Columbia.

This Eighth Joint Status Report is filed in accordance with the Board's January 10, 2023 Order to inform the Board that the Oglala Sioux Tribe has declined to file a Petition for Certiorari to the United States Supreme Court.

In addition, as directed by the Board, the parties submit the following revised recommendations:

Recommendations of Petitioner Oglala Sioux Tribe

The Oglala Sioux Tribe does not oppose the lifting of the stay in this matter given the conclusion of the proceedings in the U.S. Court of Appeals for the D.C. Circuit. The Oglala Sioux Tribe requests a 30-day period following the lifting of the stay to review and potentially amend its Petition for Review in this matter in light of the changed circumstances since the stay

was entered, including but not limited to the D.C. Circuit Court of Appeals ruling. The Oglala Sioux Tribe proposes to file a status report at the conclusion of the 30-day period to include any amended Petition along with its recommendations for the orderly resolution of this matter.

Recommendations of Intervenor Powertech (USA) Inc

Intervenor Powertech's recommendations from January 4, 2023 remain unchanged to the extent they are still relevant after March 13, 2023. Therefore, Intervenor Powertech incorporates the following recommendations into this Joint Status Report:

1. Intervenor Powertech takes no position at this time on the Tribe's request for an additional 30 days to consider filing a motion to amend its petition, provided any such motion is filed in accordance with 40 C.F.R. § 124.19(f). Intervenor Powertech will respond to any such motion in accordance with 40 C.F.R. § 124.19(f)(3).
2. When proceedings before the Board resume, Intervenor Powertech recommends the following steps for orderly resolution of the present petition:
 - a. Parties have 15 days within which to file responses to the pending motions and pleadings filed on May 18, 2021, and May 28, 2021.
 - b. Any reply to a response filed under paragraph (2) shall be filed within 10 days after service of the response.
 - c. Region 8 shall file a response to the petition, a certified index of the administrative record, and the relevant portions of the administrative record within 30 days after the Board rules on the pending motions.
 - d. Intervenor Powertech shall file a response to the petition, if it wishes, within 14 days after service of the response of the Region.

- e. Petitioner may seek leave of the Board to file a reply to the response, which the Board, in its discretion, may grant. The motion shall be filed simultaneously with the proposed reply within 10 days after service of the response of Intervenor Powertech.

Recommendations of Permit Issuer EPA Region 8

1. Consistent with the Region's recommendations filed on January 4, 2023, the Region takes no position at this time on the Tribe's request for an additional 30 days to consider amending its petition. However, the Region recommends that any such amendment be filed as a motion in accordance with 40 C.F.R. § 124.19(f) and not through a status report, nor through additional recommendations for the orderly resolution of this matter. The Region will respond to any such motion in accordance with 40 C.F.R. § 124.19(f)(3).
2. The Region takes no position at this time on Powertech's request for a schedule to address pending motions after the stay is lifted.
3. The Region recommends that, if the Board lifts the stay previously entered in this matter, and subject to any additional period that the Board may grant to address motions, the Board establish a resumed briefing schedule under which the Region's and Powertech's responses will be due 30 days from the first business day after the day the Board lifts the stay and resolves any pending motions, and the Tribe's reply will be due 15 days after the service of the Region's response. See 40 C.F.R. § 124.19(b).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing Joint Status Report in the matter of Powertech (USA) Inc., Appeal No. UIC 20-01, was filed electronically with the Environmental Appeals Board's E-filing System and served by email on the following persons on March 13, 2023.

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