

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

In re:)
)
)

Powertech (USA) Inc.)

UIC Appeal No. 20-01

)
Permit No. SD31231-00000 and)
No. SD52173-00000)
_____)

**REPLY TO EPA REGION 8’S AND POWERTECH’S RESPONSES
TO MOTION TO AMEND PETITION FOR REVIEW**

Petitioner Oglala Sioux Tribe (“Tribe”) hereby submits this Reply to the Responses filed by EPA Region 8 and Powertech to the Tribe’s Motion to Amend Petition for Review. The Board should grant the Motion as neither EPA Region 8 nor Powertech demonstrate any prejudice resulting from granting the Motion. Further, the issues raised by the Tribe involve important policy considerations and granting the Motion would result in a more efficient, fair, and impartial adjudication and permit resolution.

Neither Respondent has Demonstrated Prejudice

EPA Region 8 does not argue that it would be prejudiced by the Motion. Instead, while acknowledging that the Board has broad discretion to modify its procedural rules under 40 C.F.R. § 124.19(n), the Region asserts that instead of prejudice, the Board should focus on whether “special circumstances” exist. EPA Region 8 Response at 2-3. “Special circumstances” exist in this case due to the length of time (approximately 28 months) that has transpired since the filing of the original Petition. Importantly, this delay was due solely to the procedural processes associated with the resolution of the related litigation in the United States Court of

Appeals for the D.C. Circuit, for which the Board stayed this appeal process. Neither the Tribe nor its counsel took any action not specifically contemplated by the federal appellate rules of procedure as part of the resolution of that case. This delay is of the same kind referenced by EPA Region 8 where this Board has found special circumstances because it arose “from causes not attributable to the petitioner.” EPA Region 8 Response at 3 citing In re Town of Marshfield, Massachusetts, 07-03 (March 27, 2007).

Powertech also fails to demonstrate any prejudice. Powertech fails to assert any prejudice at all arising from the Motion itself, but rather claims a more generalized and non-specific prejudice from the length of the proceedings, but, as discussed, any such delay was solely attributable to the D.C. Circuit procedural process. Powertech relies heavily on In re Zion Energy, LLC, 9 E.A.D. 701 (EAB 2001). However, Zion Energy is inapposite. There, the Board denied an amendment requested a full thirty-days after all responses had already been filed and also presented no good cause for the failure to include the material in the original petition. Id. at 707. Here, no merits responses have been filed and good cause exists due to the “special circumstances” surrounding the 28-month D.C. Circuit process.

Powertech makes an argument centered around the administrative record. Powertech Response at 5-8. Powertech’s arguments misconstrue the petition and motion regulations (40 C.F.R. § 124.19), and instead seek to preclude issues based on the administrative record provision. Powertech Response at 7-8 *citing* 40 C.F.R. § 124.18. Powertech’s arguments are aimed at the Board’s review on the merits, and not the Board’s review of a motion:

When evaluating a challenged permit decision for clear error, the Board examines the administrative record that serves as the basis for the permit decision to determine whether the permit issuer exercised “considered judgment.”

In re GE, 18 E.A.D. 575, 608, 2022 EPA App. LEXIS 4, *73 (E.P.A. February 8, 2022) (emphasis supplied) quoting *E.g., Gen. Elec. I*, 17 E.A.D. at 560-61; *Steel Dynamics*, 9 E.A.D. at 191, 224-25; *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 417-18 (EAB 1997).

The standard applicable to motions and petitions is laid out in 40 C.F.R. § 124.19, and precedes the production of the administrative record. See 40 C.F.R. § 124.19(l) (final agency action occurs after Board review); § 124.19(b)(2) (Regional Administrator must file a response to the petition, a certified index of the administrative record, and the relevant portions of the administrative record on the same timing with the filing of the merits response).

Instead, the regulations governing motions and petitions confirm that a supplemental petition is properly based on evidence that came into existence after the permit issued, but before any party filed a response to the original petition. Id. Petitions are not limited to clear error, but may also be granted based on “[a]n exercise of discretion or an important policy consideration that the Environmental Appeals Board should, in its discretion, review.” 40 C.F.R. § 124.19 (a)(4)(i)(B). Under the present circumstances, Petitioner’s attachments and arguments support the discretion the Board possesses to grant the motion to supplement the December 2020 Petition. Powertech’s construction of the regulations would hamstring the EAB and ignore information involving both the clear error and policy considerations standards the Board will apply if the Petition is granted.

The Motion to Amend, and the petition, fulfill the motion and petition regulation by correctly explaining that the information regarding “significant events” was unavailable when the original petition was challenged. Supp.Pet at 1. 40 C.F.R. § 124.19 (a)(4)(ii) (“For each issue raised that was not raised previously, the petition must explain why such issues were not required to be raised during the public comment period as provided in § 124.13.”). Additionally, for good

cause, the Board may relax or suspend the filing requirements prescribed by these rules or Board order. 40 C.F.R. § 124.19 (n).

Petitioner respectfully submits that the unusual circumstances, particularly the 28-month time between the original petition and the Motion to Amend, provide the Board with ample discretion, and good cause, to grant the Motion to Amend Petition for Review. Id. 40 C.F.R. § 124.19(f).

The Tribe Raises Important Policy Considerations

EPA Region 8 and Powertech both argue that the Tribe has not raised issues related to important policy considerations. EPA Region 8 Response at 5-10; Powertech Response at 10-16. In doing so, however, both respondents inappropriately delve deep into the merits of the issues at stake in the Petition, rather than focus on whether the issues are of importance. The Board should decline to wade into the merits of the case in dealing with the instant Motion.

As discussed in the Motion, EPA Region 8's failure to ensure protections for cultural resources at the site, the illegality of the Project under local law, and the significantly changed scale and scope of the Project as evidenced by Powertech's own regulatory filings are issues with important policy considerations. Motion at 2-3. Under these special circumstances, in order to ensure an efficient, fair, and impartial adjudication, the Board should grant the Motion.

Conclusion

The Tribe has raised issues dealing with important policy considerations that could not have been raised in the original Petition and neither Powertech or EPA Region 8 identify any cognizable prejudice attributable to the Motion. As such, this Board should exercise its considerable discretion in this special circumstance case to grant the Tribe's Motion.

Filed this 18th Day of May, 2023.

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CERTIFICATE OF SERVICE

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