

**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

Status Report and Motion for Stay of Proceedings

U.S. Environmental Protection Agency Region 8 files this status report in accordance with the Board's order of February 23, 2021. In addition, the Region respectfully requests that the Environmental Appeals Board stay all proceedings in this matter until the resolution of a crucial National Historic Preservation Act (NHPA) question pending before the D.C. Circuit Court of Appeals.

Background

The Oglala Sioux Tribe filed its Petition for Review in this matter on December 24, 2020, seeking to overturn the Region's decision to issue two Safe Drinking Water Act (SDWA) Underground Injection Control (UIC) permits to Powertech (USA), Inc., in connection with Powertech's Dewey-Burdock In Situ Uranium Recovery Project. The Petition charges, among other things, that Region 8 failed to comply with section 106 of the NHPA in issuing the two permits. Petition at 8, 14-22. Section 106, and its implementing regulations at 36 C.F.R. part 800, require that federal agencies take into account the effects of their undertakings on historic

properties. *See* 54 U.S.C. § 306108; 36 C.F.R. § 800.1; *see also* 40 C.F.R. § 144.4(b) (identifying NHPA section 106 and 36 C.F.R. part 800 as potentially applicable to UIC permit actions).

In addition to the Petition to the Board in this matter, the Oglala Sioux Tribe (with others) has filed a challenge in the D.C. Circuit Court of Appeals to the decision by the Nuclear Regulatory Commission (NRC) to issue a Source Materials License for the project under the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, and related regulations. Petition for Review, *Oglala Sioux Tribe v. United States Nuclear Regulatory Comm’n*, No. 20-1489 (D.C. Cir. Dec. 4, 2020) (included, without its attachments, as Attachment 1). Among their arguments is that NRC “failed to satisfy the substantive and procedural duties...required by the National Historic Preservation Act.” Petitioners’ Statement of Issues to be Raised, *Oglala Sioux Tribe*, No. 20-1489 (Jan. 11, 2021) (Attachment 2). 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.

In this proceeding, responding to a motion by the Region, the Board granted a stay until April 26, 2021, to allow the new Administration to be briefed on this matter and on the underlying action, so as to determine the Agency’s position going forward. Order Staying Proceedings for Sixty Days (Feb. 23, 2021). The Board directed the Region to submit a status report by April 19, 2021, “addressing the status of its review and consultations and the anticipated timing of the Region’s further actions on this permit decision.” *Id.*

Status Report

Having briefed and consulted with appropriate newly appointed Agency decision makers, and intending to consult further with them on any future developments related to the Region’s

action, the Region now asks the Board to grant a further stay in light of the potential for this action to be affected by the litigation pending in the D.C. Circuit Court of Appeals. As explained below, a possible outcome of that litigation is a decision that could cause the Region to request the Board to remand the permits. Therefore, unless otherwise directed by the Board, the Region does not anticipate taking further action on the permits at issue in this proceeding until after the resolution of the D.C. Circuit litigation. While we cannot know when the D.C. Circuit will decide the matter, it is likely to be fully briefed by July 22 of this year. *See Oglala Sioux Tribe, Order Granting Joint Motion to Revise Briefing Schedule*, No. 20-1489 (March 11, 2021) (Attachment 3).

Motion for Stay

To comply with NHPA section 106 requirements in connection with the UIC permitting process for the Dewey-Burdock project, and after considering public comments on the issue, 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).¹ Accordingly, EPA signed a Programmatic Agreement developed by NRC and other parties, establishing EPA's compliance with the NHPA. In explaining this decision to the public, the Region explained that "[h]aving a single agency serve as the lead, with input from other agencies as appropriate, promotes efficiency in government," and that the agency had concluded that "a separate, parallel NHPA compliance effort would not meaningfully alter the protection of historic properties in connection with this undertaking." Response to Comments at 310-311.

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."

Because of EPA’s designation of NRC as the lead agency for section 106 compliance, if the D.C. Circuit upholds the NRC’s section 106 compliance, then the NHPA issues before the Board will be greatly simplified. As the Advisory Council on Historic Preservation 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/digital-library-section-106-landing/frequently-asked-questions-about-lead-federal-agencies>. On the other hand, if the D.C. Circuit grants the challenge to the NRC’s compliance, a crucial underpinning of the EPA’s permitting decision will have been removed. “[I]f the lead agency is in non-compliance with Section 106, so is the agency that designated it as lead.” *Id.* Therefore, if the D.C. Circuit were to find the NRC in noncompliance with section 106, the Region would request a remand of the permits to allow it to evaluate other approaches to establishing NHPA compliance. In either case, the final D.C. Circuit decision as to the sufficiency of NRC’s NHPA compliance would have a significant effect on these proceedings.²

The Board has previously granted stays of proceedings when issues before it were also being adjudicated in federal court. *See In re Titan Tire Corporation & Dico, Inc.*, No. CERCLA-07-2009-0006, Order Granting Stay of Proceedings (EAB Dec. 10, 2010) (in case arising under 42 U.S.C. § 9606(b), recognizing judicial economy interest and granting stay where “central” liability question was pending before federal district court). “As a general matter, the Board typically grants a motion where the movant shows good cause for its request and/or granting the

² Powertech disagrees that the D.C. Circuit action is relevant to this matter, asserting that “those proceedings and the ultimate decision in that case, regardless of the outcome, would not affect the issues that are properly before the Board in this Petition for Review.” Powertech Response to Respondent’s Motion for Stay of Proceedings (Feb. 19, 2021). The Region disagrees, for the reasons provided in the body of this motion. The Board has not yet addressed the question of the relevance of the D.C. Circuit matter. *See* Order Staying Proceedings for Sixty Days, n.1 (Feb. 23, 2021).

motion makes sense from an administrative or judicial efficiency standpoint.” *In re Desert Rock Energy Co., LLC*, 14 E.A.D. 484, 497 (EAB 2009). Here, a stay will conserve the Board’s judicial resources by avoiding the need to consider the issues on the merits before a crucial question is decided in federal court. “The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). Further, although whether NRC complied with the NHPA is relevant to this proceeding, the Board does not have jurisdiction over the other agency. Accordingly, resolution of this important question, which could decide the outcome of the challenge to EPA’s NHPA compliance, must await the conclusion of the D.C. Circuit litigation.

Petitioner will not be prejudiced by a stay because the UIC permits are stayed during the appeal process. Powertech will not be prejudiced because they have not secured necessary permits from the State of South Dakota and cannot proceed with the project until receiving those permits. In its response to the Region’s previous motion for a 120-day stay, Powertech claimed that a stay of that length would “prejudice Powertech by unduly delaying action in other proceedings” such as the South Dakota permitting action, but the company did not explain how a stay of this proceeding would delay the ongoing state proceeding. *See Powertech Response to Respondent’s Motion for Stay of Proceedings* (Feb. 19, 2021).

For the above reasons, the Region respectfully requests that the Board grant a stay of all proceedings in this matter until a mandate is issued in connection with the pending D.C. Circuit appeal. To ensure timely resolution of this matter, the Region proposes to provide a status report on August 1, 2021, and every three months thereafter. Within 30 days after the issuance of the mandate in the D.C. Circuit action, the Region will make a recommendation to the Board as to further proceedings.

Positions of Other Parties

In accordance with 40 CFR § 124.19(f)(2), Region 8 counsel contacted Powertech's representatives and Petitioner's attorney to ascertain whether the parties would concur or oppose this motion. Petitioner's counsel represented that the Tribe does not oppose this motion. Counsel for Powertech stated that the company is unable to say whether it opposes this motion without having an opportunity to read the motion first.

Statement of Compliance With Word Limitations

In accordance with 40 C.F.R. § 124.19(f)(5), the undersigned attorneys certify that this Status Report and Motion for Stay of Proceedings contains fewer than 7000 words.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing Status Report and Motion for Stay of Proceedings 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 April 19, 2021.

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