

**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

RECOMMENDATIONS

In its Order of June 10, 2021, the Environmental Appeals Board directed 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. That decision has now been reached and the mandate has issued. 45 F.4th 291 (D.C. Cir. 2022). The parties have conferred, but have not been able to arrive at one set of joint recommendations. Therefore, consistent with the Sixth and Seventh Joint Status Reports filed in this matter and in accordance with the Board’s Order of June 10, 2022, each party is submitting its proposed Recommendations for the orderly resolution of this matter as part of this filing. As such, each party’s recommendations are presented separately below. To the extent that one party agrees with another party’s recommendations, those points of alignment are stated below.

Recommendations of Petitioner Oglala Sioux Tribe

1. The rules of the U.S. Supreme Court provide the Oglala Sioux Tribal government with 90 days to seek review of the D.C. Circuit Court of Appeals ruling. The Oglala Sioux Tribe respectfully requests the Board maintain the stay of proceedings until the pending litigation involving the Nuclear Regulatory Commission licensing is complete. The Oglala Sioux Tribe would be prejudiced if the Board granted the requests to resume EPA's administrative hearings process while the NRC litigation is pending.

2. The Oglala Sioux Tribal government is in a significant transition period, with a new President and a new Tribal Council as a result of the November 2022 elections. New Tribal President Frank Star Comes Out took office in December, but with the intervening holidays, government office closures due to weather, and other immediately pressing Tribal business, the Tribal Council and President's Office have not yet been able to devote sufficient time to fully evaluate and formulate the Tribe's formal positions related to the recent D.C. Circuit Court of Appeals ruling or the Environmental Appeals Board proceedings related to the proposed Dewey-Burdock uranium mine. Similarly, the Oglala Sioux Tribal Council's Land Committee, which has some oversight responsibilities related to the Dewey-Burdock matters, has seen substantial turnover and is in the process this week of selecting its new leadership, including a new Chair of the committee. As a result, the Land Committee has also not had sufficient time to evaluate the Tribe's options to recommend a formal position related to the Dewey-Burdock matter.

3. Given the need for additional time for the new senior Oglala Sioux Tribal government officials to evaluate the Oglala Sioux Tribe's position on the Dewey-Burdock matter, the Tribe requests that the Board maintain the stay at least long enough that the President's Office and Oglala Sioux Tribal Council can evaluate the Tribe's options and

formulate the Tribe's positions regarding seeking certiorari to the U.S. Supreme Court, the Tribe's position on Powertech's proposal to litigate its procedural motions in advance of substantive briefing, as well as whether the new D.C. Circuit decision or Powertech's procedural motions warrant a motion by the Tribe to amend the Petition.

4. The Oglala Sioux Tribe anticipates being able to complete its review and analysis in accordance with March 13, 2023 deadline for filing a Petition for Certiorari to the U.S. Supreme Court. The Oglala Sioux Tribe recommends that the Board order the Tribe to coordinate with the other parties and file a report to the Board no later than March 13, 2023 with a proposal for the efficient resolution of this appeal. This recommendation would result in a reasonable extension of the stay and maintain respect for the sovereign status of the Oglala Sioux Tribe.

5. Allowing the Tribe to address the pending litigation without the burden of negotiating hypothetical resumption of the Board proceeding during ongoing NRC litigation is consistent with EPA's oft-stated respect for the government-to-government relationship between EPA and Native American Tribes that informed the adoption of the stay.

6. Last, and regardless of the length of any extension of the stay, before resuming Board proceedings, the Oglala Sioux Tribe requests a 30-day period following the lifting of the stay to review and potentially amend its Petition in light of the changed circumstances since the stay was entered, including but not limited to the D.C. Circuit Court of Appeals (or Supreme Court) ruling.

Recommendations of Intervenor Powertech (USA) Inc.

1. In consideration of the Petitioner Oglala Sioux Tribe's request for time to confer with new leadership time to evaluate and formulate the Tribe's formal positions related to the recent D.C. Circuit Court of Appeals ruling and the Environmental Appeals Board proceedings, Intervenor Powertech does not oppose a limited continuation of the stay for thirty days to allow for those evaluations to be made. Accordingly, the stay should be continued with a report due from the Petitioner by February 3, 2023 on the status of its position. In support of this recommendation, Intervenor Powertech notes that the D.C. Circuit's mandate has issued and that no stay of the mandate has been requested. Once Petitioner has decided how it wants to proceed, Intervenor Powertech submits that Petitioner can seek whatever relief it considers appropriate at that time, including a stay from the D.C. Circuit or a further stay from the Board.

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. The Region does not oppose the Tribe's recommendation for an extension of the stay, to the extent that the extension is limited to the period within which the Tribe may seek certiorari from the D.C. Circuit's decision.
2. The Region also does not oppose the Tribe's recommendation for a joint report to the Board by March 13, 2023, provided the joint report may, if necessary, present separate recommendations from each party.
3. The Region 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). The Region will respond to any such motion in accordance with 40 C.F.R. § 124.19(f)(3).
4. The Region takes no position at this time on Powertech's request for a schedule to address pending motions after the stay is lifted.
5. 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 Recommendations 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 January 4, 2023.

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