

**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

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

EPA Region 8 moves to strike new arguments raised by Petitioner for the first time in its Reply. In the alternative, Region 8 moves for leave to file a surreply in response to the new arguments raised.

Petitioner raises a number of new arguments in its Reply. None of these arguments were raised in the original Petition or during public comment. As a result, the Region and the Permittee have been denied the opportunity to respond to these new arguments, either in the response to comment or responses to the Petition. The new arguments raised were reasonably ascertainable when the Petitioner filed its Petition on December 24, 2020.

The regulations governing permit appeals specify that a “Petitioner may not raise new issues or arguments in the reply,” 40 C.F.R. § 124.19(c)(2). The 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, 272-273 (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). In fact, it recently noted this requirement in this very matter: “The Board reminds the Tribe that new arguments cannot be raised in a reply.” Order Denying Motion To Amend Petition For Review, Denying Review On The Petition’s National Historic Preservation Act Section 106 Issue, and Identifying Issues In The Petition Remaining For Resolution (Nov. 16, 2023) (“November 2023 Order”) at 29 n.25.

I. The Board should strike Petitioner’s new SDWA arguments.

a. The Board should strike all new arguments about “strict controls.”

The Petitioner introduces a new argument about “strict controls” and uses it throughout the Safe Drinking Water Act (SDWA) section in its reply. The argument first appears at the beginning of the SDWA section and asserts that:

Both Responses downplay the SDWA’s mandate that “even after an aquifer exemption is approved by EPA, the construction and operation of any underground injection well must be subject to strict controls.” *W. Neb. Res. Council v. Env’tl. Prot. Agency*, 793 F.2d 194, 196 (8th Cir. 1986) (internal citations omitted). These “strict controls” are established and implemented on a site-specific basis via updated permit regulations that place the burden on the permit applicant to show “that the requirements of this paragraph are met.” 40 C.F.R. § 144.12.

Reply at 15. It is true that the Region’s response did not address the *Western Nebraska* case referenced by the Petitioner, nor the quote from it about “strict controls” for the construction and operation of any underground injection well, but that is because the argument was never raised in public comment or by the original Petition.

This new argument by Petitioner raises a new concept but endeavors to piggyback it onto its 40 C.F.R. § 144.12 argument about the burden imposed on applicants to get the Board to consider it, even though it is not related whatsoever to an applicant's burden under 40 C.F.R. § 144.12. (As the Region details in its Response, the 40 C.F.R. § 144.12 argument is in the original petition but was never raised during public comment and was thus waived. Region Response at 19). Here, Petitioner selectively chooses a quote from *Western Nebraska* that says: "even after an aquifer exemption is approved by EPA, the construction and operation of any underground injection well must be subject to strict controls." *Western Nebraska Res. Council v. Env'tl. Prot. Agency*, 793 F.2d 194, 196 (8th Cir. 1986). Petitioner then attempts to shoehorn this quote into supporting the premise that "[t]hese 'strict controls' are established and implemented on a site-specific basis via updated permit regulations that place the burden on the permit applicant to show 'that the requirements of this paragraph are met.'" Reply at 15. However, a review of the *Western Nebraska* quote in context (a case about aquifer exemptions and not permitting) indicates that the 8th Circuit's reference to "strict controls" was not referring specifically to the applicant's burden referenced in the last line of 40 C.F.R. § 144.12 as Petitioner suggests in its Reply, but rather to the UIC regulations collectively to make the point that the UIC regulations include strict controls for underground injection even where an aquifer exemption has been approved by EPA. *Id.* As this newly introduced concept of "strict controls" from *Western Nebraska* is not related to Petitioner's original argument about an applicant's

burden under 40 C.F.R. § 144.12, and therefore a new argument introduced in the reply, all arguments relying on the “strict controls” concept are untimely and should be struck¹.

b. The Board should strike new arguments alleging there was available water quality information that the Region did not consider or offer for public comment.

Petitioner raises this new argument in its Reply brief related to its allegation that there was inadequate groundwater quality data prior to issuance of the Permits. In arguing that the issuance of permits “was based on inadequate groundwater quality information,” the Reply states:

There is no dispute that site-specific data needed to reliably model fluid movement in light of the known and unplugged boreholes connecting various acquirers [sic] was available, but was not considered or made available for comment “in advance of permitting the project.” Powertech Response at 24, Region Response at 28 *citing In re American Soda, LLP*, 9 E.A.D. 280 at 296 (EPA June 30, 2000) (SDWA permitting is based on “the data in the application, the regional data known at the time of the 17 permit application and the comments submitted to the Region”). The legal errors regarding deferral of agency consideration and public comment on available site site-specific data until after permitting should end the matter.

Reply at 16-17. The Petitioner attempts to frame it as an argument from the original Petition.

However, this is in fact a new argument that recharacterizes the one in the Petition by stating:

“Read fairly, the Tribe argues that available data required to assess the ‘prohibition on fluid movement’ must be analyzed before permitting. Petition at 38. By misconstruing the regulatory requirements and misrepresenting the Tribe’s comments regarding the recognized need for site-specific data, the Region failed to address the SWDA’s [sic] statutory prohibitions on fluid movement.” Reply at 17. To be sure, the Petition does not include any instances of the term

¹ Three other instances of Petitioner’s new “strict control” arguments appear in the Reply at p.16, 17, and 18.

“available” in its argument on baseline water quality. Petition at pp. 34-38. The Petition’s arguments around baseline groundwater information center on Powertech providing “the same data regarding the baseline water quality for its EPA permit applications as it did for its NRC license applications.” Petition at 36. And further that “while the existing administrative record contains data from 2007-2009, the background water quality for use in the actual regulatory process for the facility will be established at a *future* date, outside of any public process, and without the benefit of the public’s review and comment.” Id. (Emphasis added). Thus, the Petition’s argument outlines concerns that the Permit allows for water quality data to be collected at a future date, and not that there was available information that was not analyzed by the Region.

The new argument in the Reply brief suggests that water quality data was available to the Region, but the Region did not consider or provide to the public to comment on it. “There is no dispute that site-specific data needed to reliably model fluid movement in light of the known and unplugged boreholes connecting various acquirers [sic] was available, but was not considered or made available for comment ‘in advance of permitting the project.’ Powertech Response at 24, Region Response at 28 citing *In re American Soda, LLP*, 9 E.A.D. 280 at 296 (EPA June 30, 2000) (SDWA permitting is based on “the data in the application, the regional data known at the time of the permit application and the comments submitted to the Region”).” It is not clear why the Petitioner cites to either response brief, as they do not support the premise that there was site-specific water quality data available to the Region that was not considered or provided to the public for comment. Both of these references are discussions about boreholes, in response to Petitioner’s arguments regarding hydrogeologic data, not water quality data.

To the extent that the Petitioner may be arguing that the borehole data is relevant to the question about the adequacy of the water quality data, this would also be a new argument that was not raised in the original Petition. Therefore, the Board should not consider these new arguments in the Reply brief.

c. The Board should strike new arguments that the Region failed to require the applicant to provide site-specific information or refused to provide site-specific data for comment.

The Petitioner again selectively provides quotes from the Responses that are out of context to support a new argument. See Region Response at 26; Powertech Response at 16. Again, the Petitioner does not identify any support for the new argument. Here, Petitioner's new argument alleges that "the Region failed to require the applicant to provide site-specific information." Reply at 17. In contrast, the original Petition argued that the information that Powertech provided was "incomplete," (Petition at 36) not that the Region failed to require Powertech "to provide site-specific information." Indeed, the original Petition discusses site-specific water quality data that Powertech submitted to EPA. Petition at 35 ("Powertech relies on the same data regarding the baseline water quality for its EPA permit applications as it did for its NRC license applications.").

The Reply brief further argues that "the Region refused to provide 'site-specific data' for comment, which prohibited meaningful, informed participation by the Tribe and the public." Reply at 17. This new argument suggests either that: 1) the Region required no site-specific water quality data from Powertech or 2) the Region had site-specific water quality data that was not included in the administrative record for the public. Either interpretation of this statement is a new argument that Petitioner is prohibited from raising for the first time in its Reply brief.

II. The Board should strike Petitioner’s new NHPA section 110 arguments.

The Petition contains only a “passing reference” to NHPA section 110. November 2023 Order at 29 n.25; *see* Petition at 22. To assess the issue, the Board directed the parties to “brief the NHPA section 110 matter *as presented in the petition for review.*” *Id.* (emphasis added). But now, disregarding the Board’s admonition against raising new arguments in a reply, the Tribe has urged multiple new section 110 arguments not presented in the Petition. *See* Reply at 7-10. Therefore, the entire section 110 part of Petitioner’s Reply should be struck.

The first and most fundamental new section 110 argument in the Reply is its assertion that EPA violated section 110 of the NHPA. *Id.* at 7-10. Although the Petition and one comment mentioned section 110, in no place did the Petitioner or a commenter actually assert that EPA violated its requirements.² Petitioner states, however, that “the issue of noncompliance with Section 110” was “squarely raised” by the Petition and by the Tribe’s public comment. Reply at 9. This claim is inconsistent with the text of the Petition and the comment; as the Board has

² In full, the Petition’s discussion of section 110 is:

In addition to Section 106 NHPA duties, NHPA Section 110 also ensures proper identification and evaluation of cultural resources. 16 U.S.C. § 470h–2. *See* Attachment 2 (Tribe’s 2019 comments) at bates 0009. These duties extend beyond those imposed by the Section 106 consultation process and cannot be satisfied by mere outreach letters.

Petition at 22. The referenced comment’s entire discussion of section 110, which is the only mention of section 110 that the Region has found in the public comments, is nearly identical:

In addition to the Section 106 NHPA duties, NHPA Section 110 imposes responsibilities on EPA to ensure a proper identification and evaluation of cultural resources. These duties cannot be dispensed with simply through attempts to contact the Tribe in the Section 106 consultation context.

Petition, Attachment 2 (Comments submitted by Petitioner Oglala Sioux Tribe) at 8.

already recognized, “[i]t is not clear on the face of the petition whether the Tribe is asserting that the Region violated NHPA section 110, or how, in fact, it violated that section.” November 2023 Order at 29 n.25. Petitioner’s sole justification for its “squarely raised” assertion is the statement that section 110 “imposes responsibilities [that] cannot be dispensed with simply through attempts to contact the Tribe in the Section 106 consultation context.” Reply at 9. But even setting aside the fact that this statement does not identify any specific responsibility that was allegedly dispensed with,³ nowhere does Petitioner or the comment state that the Region acted contrary to section 110 responsibilities. In this regard, it is telling that in its recent order concerning issues remaining for resolution, the Board cited the “reference” to section 110 in the Petition, and the section 110 “matter” – not the “claim,” which is the word used for the three other issues discussed. November 2023 Order at 29 and n. 25.

From its new assertion that the Region violated NHPA section 110, Petitioner makes several narrower claims, also all new. The Tribe’s other new section 110 arguments seem to be based on the assertion that this provision “created new procedural requirements for the protection of historic and cultural resources.” Reply at 7 (citing *Recent Past Pres. Network v. Latschar*, No. CIV.A.06-2077 TFH AK, 2009 WL 6325768, at *7 (D.D.C. Mar. 23, 2009)). But neither the

³ In addition to being new as of Petitioner’s Reply, the claim of section 110 violation presents no specific challenge to the Region’s actions. As enacted, section 110 stretches across 11 sections of the U.S. Code. See 54 U.S.C. §§ 306101–306107, 306109–306112. These sections are varied in nature, but cover topics including the management and transfer of agency-owned historic properties, establishment of historic preservation programs and officials, general direction to agencies to act in accordance with the purpose of the statute, requirements for projects taking place at national historic landmarks, and the establishment of an annual preservation awards program. Even considering its belated argument on reply, Petitioner has never identified which of the 11 subparts of section 110 the Region purportedly violated. The Region discusses the requirement for a Petition to present a specific challenge in its Response at 7-8.

Petition nor any comment identifies section 110 procedural requirements relevant to this proceeding. The only effort to do so is the Reply's quotation from the district court decision in *Oglala Sioux Tribe v. U.S. Army Corps of Engineers*, 537 F. Supp. 2d 161 (D.D.C. 2008):

As the *Oglala Sioux Tribe* Court ruled, citing *Blanck*, Section 110 “requires an agency ‘to comply to the fullest extent possible with, and in the spirit of, the Section 106 consultation process and with its own Historic Preservation Plan.’”

Reply at 7 (quoting *Oglala Sioux Tribe*, 537 F. Supp. 2d at 173, and *Nat'l Trust for Historic Pres. v. Blanck*, 938 F. Supp. 908, 925 (D.D.C.1996)). To the extent Petitioner is asserting that the “new procedural requirement” established by section 110 consists of an incorporation of the section 106 consultation process, that is a new argument on reply.⁴ Similarly, the Petition makes no mention of a Historic Preservation Plan.⁵ Hence, Petitioner did not preserve error as to this argument.

The Reply claims two additional violations of section 110: “the Region’s short-sighted carte blanche adoption of the Nuclear Regulatory Commission (NRC) staff’s NHPA process,” and “that there has never been a competent Lakota cultural resources survey conducted on the Dewey-Burdock site,” which “fatally undermines the Programmatic Agreement.” Reply at 8, 9.

⁴ Substantively, it has also already been decided by the Board, in denying review on Petitioner’s Section 106 claim. See November 2023 Order at 30. The law of the case doctrine therefore bars Petitioner from seeking to relitigate its NHPA section 106 arguments in this forum. *See, e.g., In Re: Service Oil, Inc.*, Final Decision and Order, 2011 WL 6140880, at *7 (Dec. 7, 2011) (“Under the doctrine, once a court decides an issue of fact or law, either explicitly or by necessary implication, that court's decision on the issue will be treated as binding — i.e., as the ‘law of the case’ — in subsequent proceedings in the same case.”).

⁵ This omission is understandable, because the Historic Preservation Plan that the *Blanck* case was discussing was a requirement of U.S. Army regulations. *See* 938 F. Supp. at 923. It has no apparent relevance to this proceeding.

As with all of the other section 110 arguments in the Reply, these are new. Neither the Petition nor any comment characterized these concerns as related to section 110.⁶

The Reply's NHPA section 110 discussion includes other statements, for instance concerning intermediate administrative decisions by the NRC's Atomic Safety and Licensing Board, but to the Region they do not appear to raise any specific arguments. To the extent they do, however, those arguments are entirely new as of the reply, and therefore should be struck. Further, because the general statements in the Petition and one comment did not preserve error or identify *any* specific challenge based section 110,⁷ it necessarily follows that *all* of the section 110 arguments in Petitioner's Reply are new arguments, and impermissible to raise on reply. Accordingly, the Board should strike the entire section 110 portion of the Reply.

III. The Board should strike Petitioner's new NEPA functional equivalence argument.

For the first time in its Reply, Petitioner raises the argument that the "EPA is subject to NEPA compliance unless statutorily exempted, which the functional equivalence doctrine cannot achieve." Reply at 12. The Board should strike this new argument because it was not raised in public comments and the Petition did not raise it.

⁶ In addition, these questions have already been decided by this Board, which in denying review on section 106 upheld the Region's decision to designate NRC as the lead agency for section 106 consultation and review. *See* November 2023 Order at 22-30; *see also* n. 4, above (discussing law of the case doctrine).

⁷ For that reason, as the Region has argued, the Board should deny review altogether as to section 110. *See* Region Response at 6-8.

Conclusion

The Board should strike the new arguments raised by Petitioner for the first time in its Reply regarding the SDWA, NHPA section 110 and the NEPA functional equivalence doctrine. As discussed above, these new arguments were not raised in public comments or in the original Petition and therefore Petitioner is prohibited from raising these new arguments in its Reply. In the alternative, Region 8 moves for leave to file a surreply in response to the new arguments raised.

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 to strike. The Region represented that the motion would address new arguments raised regarding NHPA section 110, NEPA, and SDWA. Petitioner's counsel represented that, absent any further information, the Tribe would oppose the motion. Counsel for Powertech stated that they do not object to the motion.

Statement of Compliance With Word Limitations

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

Respectfully submitted,

DATE: February 7, 2024

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CERTIFICATE OF SERVICE

I certify that the foregoing EPA REGION 8 MOTION TO STRIKE AND ALTERNATIVE MOTION FOR LEAVE TO FILE SURREPLY 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 February 7, 2024.

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