

**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 FOR STAY OF PROCEEDINGS

The U.S. Environmental Protection Agency (“EPA”) Region 8 (“Region”) respectfully requests that the Environmental Appeals Board (“EAB” or “Board”) stay the proceedings in this case for 120 days to allow discussions with the new Administration and review of the matter by newly appointed Agency decision makers.

The Oglala Sioux Tribe (“Petitioner” or “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 Underground Injection Control (“UIC”) permits to Powertech (USA), Inc. (“Powertech”) in connection with Powertech’s Dewey-Burdock In Situ Uranium Recovery Project. A stay of proceedings by the Board will allow the new Administration, which took office on January 20, 2021, to be briefed on this matter and on the underlying action to determine the Agency’s position going forward in this matter, consistent with the recent Executive Order on Protecting Public Health and Environment and Restoring Science to Tackle the Climate

Crisis. Exec. Order No. 13990, 86 Fed. Reg. 7037 (Jan. 25, 2021). Section 1 of the Executive Order states that among the policies of the new Administration are “to improve public health and protect our environment, and ensure access to clean air and water.” Under the Executive Order, federal agencies must further this policy by, among other things, examining whether Agency actions in the last four years are consistent with the goals expressed in the order. The requested stay will allow the Agency to take actions in this case in a manner consistent with the policies and directions in the Executive Order.

In addition, a stay in this matter will also allow Agency decision makers to evaluate the potential for this action to be affected by litigation pending in the D.C. Circuit Court of Appeals. *See Oglala Sioux Tribe v. United States Nuclear Regulatory Comm’n*, No. 20-1489 (D.C. Cir. Dec. 4, 2020). In the D.C. Circuit, petitioners including the Oglala Sioux Tribe, are seeking to overturn 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. Among their arguments is that NRC “failed to satisfy the substantive and procedural duties...required by the National Historic Preservation Act.” *Oglala Sioux Tribe*, No. 20-1489 (Statement of Issues, filed Jan. 11, 2021).

The challenge to the NRC action is relevant to this matter because the Tribe has made a similar allegation here, charging that EPA failed to comply with section 106 of the NHPA in issuing the two UIC permits to Powertech. The Region relied on the NHPA compliance work conducted by NRC, in accordance with an applicable regulation allowing the designation of a lead agency for NHPA section 106 compliance. *See* 36 C.F.R. § 800.2(a)(ii). Therefore, a final D.C. Circuit decision as to the sufficiency of NRC’s NHPA compliance may affect the Board’s consideration of EPA’s compliance. A 120-day stay will allow the new Agency decision makers

to be briefed on this issue and to decide whether to seek a further stay in light of the D.C. Circuit petition.

A stay will conserve the Board's judicial resources by avoiding the need to consider the issues on the merits before the new Administration has the opportunity to determine its position in this proceeding. Petitioner will not be prejudiced because the permits are stayed during the appeal process. Powertech will not be prejudiced by a stay because they have not secured necessary permits from the State of South Dakota and cannot proceed with the project until this occurs.

For the above reasons, the Region respectfully requests that the Board grant a stay of all proceedings in this matter for 120 days. At that time, Region 8, in coordination with EPA Headquarters, can provide a status report and will make a recommendation on further proceedings.

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. Powertech opposes this motion.

STATEMENT OF COMPLIANCE WITH WORD LIMITATIONS

In accordance with 40 C.F.R. § 124.19(f)(5), the undersigned attorneys hereby certify that EPA Region 8's Motion for Stay of Proceedings in UIC Appeal 20-01 contains fewer than 7000 words.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing 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 was served on the following persons, this 16th day of February 2021 in the manner indicated below.

By Electronic Email

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