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

In re:	
Powertech (USA) Inc.	
Permit Nos. SD31231-00000 & SD52173-00000	UIC Appeal No. 20-01

POWERTECH MOTION TO STRIKE NATIONAL ENVIRONMENTAL POLICY ACT CHALLENGES

Powertech (USA) Inc. ("Powertech") moves to strike from the petition for review filed by the Oglala Sioux Tribe all challenges to the permit decisions that assert failure to comply with the requirements of the National Environmental Policy Act ("NEPA"). All such challenges are explicitly excluded by 40 C.F.R. § 124.9(b)(6) which provides that UIC permits "are not subject to the environmental impact statement provisions of § 102(2)(C) of the National Environmental Policy Act." Accordingly, such claims are not properly before the Environmental Appeals Board ("Board").

The Board's consideration of petitions for review of UIC permits is guided by the principles that "the Board's power of review 'should be only sparingly exercised'" and that "the burden of demonstrating that review is warranted rests with the petitioner." *In re Environmental Disposal Systems, Inc.*, 12 E.A.D. 254, 263-64 (EAB 2005) (quoting 45 Fed. Reg. 33,290, 33,412 (May 19, 1980).

Petitioners "must demonstrate that each challenge to the permit decision is based on a finding of fact or conclusion of law that is clearly erroneous." 40 C.F.R. § 129.19(a)(4)(i). To satisfy that standard, "it is not enough to merely cite or reiterate comments previously submitted on the draft permit." *Arizona Pub. Service*, 18 E.A.D. at 251 (citing *In re City of Taunton Dep't of Pub. Works*, 17 E.A.D. 105, 111 (EAB 2016), *aff'd*, 895 F.3d 120 (1st Cir. 2018), *cert. denied*, 139 S. Ct. 1240 (2019). Instead, "the petitioner must demonstrate, with factual and legal support, why the Region's response to comments on the issue raised is clearly erroneous or otherwise warrants review." *Arizona Pub. Service*, 18 E.A.D. at 251 (citing 40 C.F.R. § 124.19(a)(4)(i); *see, e.g., In re Seneca Res. Corp*., 16 E.A.D. 411, 416 (EAB 2014)).

The scope of the Board's review is also limited by the long-established principle that "parties objecting to a federally-issued UIC permit must base their objections on the criteria set forth in Safe Drinking Water Act and its implementing regulations." *In re Brine Disposal Well, Montmorency County, Michigan*, 4 E.A.D. 736, 742 (EAB 1993). Challenges to UIC permits must therefore "pertain exclusively to the UIC program and its focus on protecting underground sources of drinking water from possible harm caused by underground injection activities." *In re Jordan Development Co*., 18 E.A.D. 1, 11 (EAB 2019); *see In re Environmental Disposal Systems, Inc.*, 12 E.A.D. 254, 266 (EAB 2005) (the Board's "authority to review UIC permit decisions extends to the boundaries of the UIC permitting program itself, with its SDWA-directed focus on the protection of USDWs, and no farther"); *In re Am. Soda,* L.L.P., 9 E.A.D. 280, 286 (EAB 2000) ("the SDWA and the UIC regulations authorize the Board to review UIC permitting decisions only as they affect a well's compliance with the SDWA and applicable UIC regulations"); *In re NE Hub Partners, L.P*., 7 E.A.D. 561, 567 (EAB 1998) ("protection of

interests outside of the UIC program [is] beyond our authority to review in the context of [a UIC] case"), *review denied sub nom. Penn Fuel Gas, Inc. v. U.S. EPA*, 185 F.3d 862 (3d Cir. 1999).

In its Response to Comments EPA summarized the NEPA challenges presented during the public comment process as follows:

> EPA received comments regarding EPA's compliance with the National Environmental Policy Act (NEPA) and EPA's compliance with NEPA's implementing regulations. EPA also received comments regarding statutory and regulatory exemptions for EPA compliance with NEPA. In addition, EPA received comments regarding the applicability of the doctrine of NEPA functional equivalency to EPA, the legal basis for the NEPA functional equivalence doctrine, and EPA's compliance with the NEPA functional equivalence doctrine. EPA also received comments regarding the Nuclear Regulatory Commission (NRC)'s NEPA analysis.

EPA Response to Comments ("RTC") at 312 (Attachment 35 to the Petition in this case).
In response, EPA stated

> EPA determined that its action on Powertech's applications for Class III and Class V Underground Injection Control (UIC) permits and the aquifer exemption pursuant to SDWA is exempt from NEPA consistent with EPA's longstanding view, as well as the U.S. Court of Appeals for the 8th Circuit's decision in *Western Nebraska Resources Council v. U.S. E.P.A.*, 943 F.2d 867 (8th Cir. 1991) and other relevant NEPA case law. EPA did not need to conduct a formal NEPA analysis prior to making its SDWA decisions on Powertech's applications for the

UIC permits and aquifer exemption. October 23, 2020 Memo from Sarah Bahrman, Chief, Drinking Water Branch, EPA Region 8 to the File.

The petition failed to provide any explanation why EPA's response and its reliance on the regulation and judicial precedent, as well as the other supporting materials cited by EPA in the remainder of its response (RTC at 313-16) is clearly erroneous. That is a fatal flaw and supports striking the NEPA challenges from the petition.

A. National Environmental Policy Act Challenges Are Precluded.

The Petition urges the Board to entertain a challenge to the Region's compliance with National Environmental Policy Act ("NEPA") requirements.

The short and sufficient answer to all of Petitioners' NEPA claims is that the Board, in reviewing UIC permits, has no jurisdiction to review alleged deficiencies in NEPA compliance. *In re American Soda*, LLP, 9 E.A.D. 280, 290-91 (2000). The reason for this is straight-forward: "the SDWA and the UIC regulations authorize the Board to review UIC permitting decisions only as they affect a well's compliance with the SDWA and applicable UIC regulations," Am. Soda, 9 E.A.D. at 286, and those regulations specifically provide that UIC permits "are not subject to the environmental impact statement provisions of § 102(2)(C) of the National Environmental Policy Act." 40 C.F.R. § 124.9(b)(6).

The plain text of 40 C.F.R. § 124.9(b)(6) is dispositive of the NEPA issues. Petitioner seeks to ignore that regulation, apparently suggesting that – instead of meaning what it says – it authorizes the Board to apply the "functional equivalence" doctrine in the context of individual UIC permit decisions to determine whether NEPA compliance is required. *See* Petition at 25. This suggestion is absurd: if the intent of the rule had been to charge the Board with the task of applying the "functional equivalence" doctrine to UIC permit decisions on a case-by-case basis,

its text would have said something to the effect that UIC permits "may be subject to" NEPA requirements instead of flatly stating that they "are not." Nevertheless, the Petition goes on to argue that NEPA compliance was required because the Permits are not exempt from such requirements under the "functional equivalence" doctrine. There are at least three independently sufficient reasons to reject this line of argument.

First, the Petition does not effectively contest the Region's reliance on the applicable regulation: 40 C.F.R. § 124.9(b)(6). The Region's Response to Comment explained that "UIC permits are exempt from NEPA pursuant to 40 C.F.R. § 124.9(b)(6) as well as the functional equivalence doctrine," RTC at 315, and "[u]nder the plain language of this regulatory provision" NEPA compliance was not required. *Am. Soda*, 9 E.A.D. at 291-92. The Petition fails to "explain why" the Region's stated reliance on the regulation itself "was clearly erroneous or otherwise warrants review," 40 C.F.R. § 124.19(a)(4)(ii), and this "failure to address the permit issuer's response to comments" is, by itself, "fatal to" Petitioner's NEPA claims. *In re Indeck-Elwood, LLC*, 13 E.A.D. 126, 143, 170 (EAB 2006).

Second, 40 C.F.R. § 124.9(b)(6) is "dispositive on the question of the UIC permit program's functional equivalence to NEPA." *Am. Soda*, 9 E.A.D. at 292. The Petition's foray into the "functional equivalence" doctrine is a collateral attack on that regulation, and the Board is not a proper forum for challenges to EPA regulations. *In re Archer Daniels Midland Co.*, 17 E.A.D. 380, 404-05 (EAB 2017); *In re FutureGen Indus. All., Inc*., 16 E.A.D. 717, 724 (EAB 2015), pet. for review dismissed as moot sub nom. *DJL Farm L.L.C. v. EPA*, 813 F.3d 1048 (7th Cir. 2016); *In re Tondu Energy Co*., 9 E.A.D. 710, 716 n.10 (EAB 2001). Petitioner's "functional equivalence" arguments should be rejected for this reason. *See Am. Soda*, 9 E.A.D. at 292 n.13 (declining to consider a collateral attack on 40 C.F.R. § 124.9(b)(6) in the context of

a UIC permit appeal) [citing *In re Woodkiln, Inc*., 7 E.A.D. 254, 269 (EAB 1997); *In re Suckla Farms, Inc*., 4 E.A.D. 686, 698 (EAB 1993).

Third, Petitioner's arguments concerning the "functional equivalence" doctrine fail for the simple reason that they are contrary to binding judicial and administrative precedent that the Region cited in its response to comment. *See* RTC at 313-14 citing *Western Nebraska Resources Council v. EPA*, 943 F.2d 867, 872 (8th Cir. 1991), *Am. Soda*, 9 E.A.D. at 290-92, *In re Beeland Group, LLC*, 14 E.A.D. 189, 205-06 (EAB 2008); *In re Windfall Oil and Gas, Inc*., 16 E.A.D. 769, 811 (EAB 2015). The Petition did not present any good faith argument that this precedent should be overturned or that the Region committed any error in relying upon it; it simply presented its arguments as though substantial contrary precedent did not exist. This inexplicable failure to address the Region's response to comment raising NEPA compliance issues is also fatal to Petitioner's NEPA claims. *In re Indeck-Elwood*, LLC, 13 E.A.D. 126, 143, 170 (EAB 2006).

B. UIC Requirements for Review of Injection Well Cumulative Effects Do Not Implicate NEPA.

The "cumulative effects" requirement of 144.33(c)(3) referenced in the Petition in an effort to imply that NEPA review is required is unrelated to NEPA and requires instead that EPA consider the additional contributions of future wells that could be constructed pursuant to an area permit within the specifically defined area of review ("AoR"). "Our only role under the SDWA is to consider this issue to determine whether effects related to the drilling and operation of additional injection wells are acceptable. See 40 CFR § 144.33(c)(3)." RTC at 318. Other issues required to be addressed in a NEPA analysis are "not within EPA's UIC permitting authorities." *Id*.

EPA added the "cumulative effect" requirement to the UIC regulations in 1980 in response to public comments objecting "to the authorization of new wells within an area covered by an area permit where the Director has not considered the cumulative impact of the new wells". 45 Fed. Reg. 33290, 33333 (May 19, 1980). The added language requires "that the Director consider these cumulative impacts before issuing an area permit which authorizes new wells to be drilled without specific approval". *Id*. Significantly, "[t]he final rules do not require that the location of every well that might be drilled under an area permit be identified in advance of permit issuance. However, there must be sufficient information on potential new wells in order for the Director to consider cumulative impact." *Id*. at 33334.

The cumulative effects to be considered are specifically "effects of drilling and operation of additional injection wells" with respect to potential endangerment of underground sources of drinking water (USDWs). On August 27, 1981, EPA published "technical amendments as part of a settlement agreement reached with petitioners who [had] challenged the regulations in court." The amendments included changes to the area permit provisions. EPA explained "[b]oth the proposed and final UIC regulations included the concept of an area permit to allow an owner or operator of wells with a similar purpose and construction to be authorized by a single permit. The Agency did not intend that injection wells authorized under area permits be required to satisfy most requirements on a single well basis." EPA clarified: "The applicant has the choice of applying for a single well or an area permit provided that he qualifies under § 122.39."

With respect to the required "cumulative effects" analysis, EPA added the term "project" to its definition of area of review "to clarify requirements for area permit applicants and holders" and noted:

> The definition of area of review in § 146.03 and § 122.3 is amended to clarify the use of the concept in the case of facilities applying for area permits. The new wording emphasizes that in such cases, the area of review includes both the project area and the surrounding area as established according to § 146.06. In addition, the language in § 146.03, which defines area of review is incorporated into §§ 146.06(a)(2), 146.06(b)(1) and 146.06(b)(2) to state Agency intent more clearly.

46 Fed. Reg. 43156, 43157(August 27, 1981). Accordingly, the UIC requirement to review cumulative effects for area permits is specifically directed at examining within the AoR for potential endangerment of USDWs and does not trigger a NEPA review contrary to the regulatory exemption of UIC permitting from NEPA. As EPA explained in the CEA, "The Dewey-Burdock Project Area of Review proposed in Powertech's Class III Application is the area for which EPA analyzed the cumulative effects from the drilling and operation of injection wells. The Area of Review includes the Dewey-Burdock Project Area and a buffer zone of 1.2 miles outside the Project Area boundary." EPA, Cumulative Effects Analysis at 1 ("CEA") (Attachment 1 to this Motion). EPA then clarified that "the CEA's considerations are limited to those environmental effects at or near the project site that occur close in time with the drilling and operation of the injection wells." *Id*. Furthermore, although acknowledging that the CEA itself discusses many other potential environmental effects, including many addressed by NRC in its NEPA analyses, "EPA clarifie[d] that these summaries were provided for informational purposes only and that additional analysis on these topics are not required under 40 CFR Section 144.33(c)(3)." *Id*. In responding to comments on potential environmental concerns unrelated to the injection wells, EPA repeatedly noted that "these activities are outside the scope of the

analysis required in 40 CFR § 144.33" and reiterated that "EPA's discussion of cumulative effects of radioactive waste is limited to those environmental effects at or near the project site that occur close in time with the drilling and operation of the injection wells. It does not include activities further in time or too far away from the project site." RTC at 317.

Conclusion

For the foregoing reasons, Powertech respectfully requests the Board to strike the NEPA challenges from the Petition for review in this case.

Positions of Other Parties

In accordance with 40 CFR § 124.19(f)(2), Powertech counsel contacted Region 8's representatives and Petitioner's attorney to ascertain whether the parties would concur or oppose this motion. Counsel for Petitioner and Counsel for Region 8 both stated opposition to this 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 to Strike NEPA Challenges contains fewer than 7000 words.

Respectfully submitted,

/s/ Robert F. Van Voorhees

Robert F. Van Voorhees
Robert F Van Voorhees PLLC
1155 F Street, N.W.
Suite 700
Washington, DC 20004-1357
Telephone: 202-365-3277
E-mail: bob.vanvoorhees@gmail.com
Representing Powertech (USA) Inc.

Barton Day
Law Offices of Barton Day, PLLC
10645 N. Tatum Blvd.
Suite 200-508
Phoenix, AZ 85028
Telephone: (703) 795-2800
E-mail: bd@bartondaylaw.com
Attorney for Powertech (USA) Inc.

Dated: May 18, 2021

CERTIFICATE OF SERVICE

I hereby certify that, on May 18, 2021, I served the foregoing document on the following persons by e-mail in accordance with the Environmental Appeals Board's September 21, 2020 Revised Order Authorizing Electronic Service of Documents in Permit and Enforcement Appeals:

Attorneys for Petitioner Oglala Sioux Tribe
Jeffrey C. Parsons, Senior Attorney
Roger Flynn, Managing Attorney
Western Mining Action Project
P.O. Box 349
Lyons, CO 80540
(303) 823-5738
wmap@igc.org

Travis E. Stills
Managing Attorney
Energy & Conservation Law
1911 Main Ave, Ste 238
Durango, CO 81301
(970) 375-9231
stills@frontier.net

Attorney for Amicus Curiae Great Plains Tribal Water Alliance, Inc.
Peter Capossela, PC
Attorney at Law
Post Office Box 10643
Eugene, Oregon 97440
(541) 505-4883
pcapossela@nu-world.com

Lucita Chin
Senior Assistant Regional Counsel
Environmental Protection Agency Region 8
595 Wynkoop St.
Mail Code: 8ORC-LC-M
Denver, CO 80202
chin.lucita@epa.gov

Michael Boydston
Office of Regional Counsel
EPA Region 8
1595 Wynkoop St.
Mail Code: 8ORC-LC-G
Denver, CO 80202
(303) 312-7103
boydston.michael@epa.gov

/s/ Robert F. Van Voorhees
Robert F. Van Voorhees
Robert F Van Voorhees PLLC
1155 F Street, N.W.
Suite 700
Washington, DC 20004-1357
E-mail: bob.vanvoorhees@gmail.com
Representing Powertech (USA) Inc.