

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

In re:

Powertech (USA) Inc.
Dewey-Burdock Uranium In-Situ
Recovery Project,
Class III Area Permit No.
SD31231-00000; AND
Class V Area Permit No.
SD52173-00000

**PETITIONERS' RESPONSE TO MOTION TO STRIKE AND
ALTERNATIVE MOTION FOR LEAVE TO FILE SURREPLY**

Applicant Powertech (USA) Inc. ("Powertech") filed a Motion to Strike and Alternative Motion for Leave to File Surreply ("Motion") on July 11, 2025. As indicated in the Motion, during conferral Petitioners did not oppose the filing of a surreply limited to the issues related to Mr. Cast Iron-Shell's Declaration attached to Petitioners' Reply ("Reply Declaration"), but did oppose the request to strike the Reply Declaration. However, Powertech did not provide a proposed surreply in conjunction with its Motion.

Based on the filing, however, Petitioners do oppose the Motion, including the request to file a surreply. *See generally* 40 C.F.R. pt. 124 (containing no provisions authorizing surreply briefs as a matter of right). As described in the Motion, Powertech seeks to initiate a new round of briefing over what it characterizes as novel issues (Motion at 1), which will in turn likely require additional briefing by all parties. The request to strike should be denied and the Board

should not authorize another round of briefing initiated by a Powertech surreply to address novel issues only cursorily previewed, but not discussed by Powertech.

Powertech argues that the Reply Declaration should be stricken from the proceedings. Motion at 2-4. In support, Powertech relies primarily on one case, *In re City of Keene*, 18 E.A.D. 720, 746 (EAB 2022). Motion at 4. In *City of Keene*, the Board declined to review new arguments raised on Reply. However, the types of issues addressed in *City of Keene* are distinct from those at issue here. In *City of Keene*, the Board was presented with new material that “alter[ed] the substance of [Petitioner’s] argument in its reply brief in such a way that the argument takes on new and fundamentally different contours.” 18 E.A.D. at 746. No such “new and fundamental” arguments are at stake in this case.¹

Rather, here Petitioners included on Reply the Declaration of Andrew Catt-Iron Shell to rebut Powertech’s and EPA’s arguments in their respective Responses challenging NDN Collective’s standing. The one-page Reply Declaration merely clarifies the unchallenged facts that Mr. Catt-Iron Shell is a representative of NDN Collective and that he did make comment to the EPA during a public hearing on the challenged permits in Hot Springs, South Dakota in 2019. Nothing more is required by EPA’s relevant regulations.

The Board should reject Powertech’s attempts to play ‘gotcha’ with the regulations, as federal courts have addressed the EPA’s public comment regulations and found that:

The purpose of the regulation requiring participants to raise ascertainable issues, however, is not to foreclose participation in the process, but to provide notice to the EPA so that it can address issues in the early stages of the administrative process. *See* 44 Fed.Reg. 32,885 (1979); *In the Matter of Broward County, Florida*, NPDES Appeal No. 92–11, 11 (1993). It would be inconsistent with the general purpose of public

¹ The other cases referred to by Powertech, albeit only in the introduction to the Motion, similarly deal only with a party attempting to raise significant and wholly new merits arguments in a Reply – a situation not present here. *See In re Arizona Public Service*, 18 E.A.D. 245, 272-73 (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).

participation regulations to construe the regulations strictly.

Adams v. U.S. E.P.A., 38 F.3d 43, 52 (1st Cir. 1994). Indeed, “[t]he person filing the petition for review, however, does not necessarily have to be the individual who raised the issue during the comment period.” *Id.*, 38 F.3d at 52 n.7. Contrary to the language and purpose of the regulations, Powertech pursues novel arguments that seek to foreclose NDN Collective’s participation in these proceedings.

Further, Powertech’s argument for striking the Declaration is inconsistent with applicable EPA regulations requiring only that “the petitioner must demonstrate that any issues and arguments it raises on appeal were preserved for Board review by having been raised during the public comment period, **unless the issues or arguments were not reasonably ascertainable before the close of public comment.** 40 C.F.R. §§ 124.13, .19(a).” *Upper Blackstone Water Pollution Abatement Dist.*, 15 E.A.D. at 301-302 (emphasis added) (footnote omitted). Here, as described in the Petition and Reply, all of the arguments raised in this proceeding were either raised previously and preserved in the prior Petition or were not reasonably ascertainable, in that the facts and law underlying them have changed since the 2020 permit issuance – and Region 8 deliberately denied any public opportunities for comment on remand despite the over five year lapse in time since the last public comment opportunity. Regardless of whether the Region lawfully precluded public comment on remand despite the lengthy time gap and the changed legal and factual circumstances, the regulations do not support Petitioners being punished for the Region’s questionable tactical choices in foreclosing public comments.

In any case, as discussed, Petitioners are allowed to raise in a Petition any arguments that “were not reasonably ascertainable” and based on “any changes to the permit required by intervening changes in the law governing the permit.” *Upper Blackstone Water Pollution*

Abatement Dist., 15 E.A.D. at 301-302 citing 40 C.F.R. §§ 124.13, .19(a). This is what NDN Collective has done in this case, fully within the spirit and language of the regulations, as no party was aware of the current factual circumstances surrounding the permit at the last public comment opportunity in late 2019. As a result, NDN Collective should at minimum be granted standing to pursue the new issues addressed in the new Petition for which the factual and/or legal bases arose after 2019, including the NHPA expired programmatic agreement, SDWA cumulative effects, and APA inadequate record issues addressed in the most recent Petition.

Overall, this Board should deny the Motion to Strike. Further, based on the content of the Motion, the failure to provide a proposed surreply, and the proposed novel topics proposed for surreply briefing that will in all likelihood require Petitioners to seek leave to reply in kind, the Board should similarly deny the request to file a surreply. The issues are all fairly presented and further briefing will unnecessarily consume additional Board, Staff, and Party resources.

/s/ Jeffrey C. Parsons
Jeffrey C. Parsons
Senior Attorney
Roger Flynn
Managing Attorney
Western Mining Action Project
P.O. Box 349
Lyons, CO 80540
Tel: (303) 823-5738
Fax: (303) 823-5732
Email: wmap@igc.org

Travis E. Stills
Managing Attorney
Energy & Conservation Law
227 E. 14th St. #201
Durango, Colorado 81301
(970) 375-9231
stills@eclawoffice.org

Date: July 25, 2025

Attorneys for Petitioners

Oglala Sioux Tribe
Black Hills Clean Water Alliance
NDN Collective

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Response to Motion to Stike in the matter of Powertech (USA) Inc., Dewey-Burdock Uranium In-Situ Recovery Project, Permit No.: Class III Area Permit No. SD31231-00000, And Class V Area Permit No. SD52173-00000, was served, by email in accordance with the Environmental Appeals Board's September 21, 2020 Revised Order Authorizing Electronic Service of Documents in Permit and Enforcement Appeals, on the following persons, this 25th Day of July, 2025:

Attorneys for EPA Region 8:

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

Katie Spidalieri, Attorney-Advisor
Water Law Office, Office of General Counsel
U.S. Environmental Protection Agency
(202) 564-4138
spidalieri.katie@epa.gov

Attorneys for Powertech (USA) Inc.:

Jason A. Hill
Hunton Andrews Kurth LLP
600 Travis
Suite 4200
Houston, Texas 77002
Telephone: (713) 220-4510
E-mail: hillj@huntonak.com

Kerry McGrath
Hunton Andrews Kurth LLP

2200 Pennsylvania Ave. NW
Washington, DC 20037
Telephone: (202) 955-1519
E-mail: KMcGrath@huntonak.com

Robert F. Van Voorhees
Robert F Van Voorhees PLLC
155 F Street, N.W.
Suite 700
Washington, DC 20004-1357
(202) 365-3277
bob.vanvoorhees@gmail.com

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

/s/ Jeffrey C. Parsons
Jeffrey C. Parsons
Senior Attorney
Western Mining Action Project
P.O. Box 349
Lyons, CO 80540
Tel: (303) 823-5738
Fax: (303) 823-5732
Email: wmap@igc.org

Attorney for Petitioners

Date: July 25, 2025