

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

In re:)	
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Powertech (USA) Inc.)	
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Permit Nos. SD31231-00000 & SD52173-00000)	UIC Appeal No. 25-01
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)	

**REPLY BRIEF IN SUPPORT OF MOTION TO STRIKE AND ALTERNATIVE
MOTION FOR LEAVE TO FILE SURREPLY**

Powertech (USA) Inc. (“Powertech”) filed a Motion to Strike and Alternative Motion for Leave to File Surreply (“Motion”) on July 11, 2025, which turns on whether NDN Collective “filed comments on the draft permit or participated in a public hearing on the draft permit” in satisfaction of 40 C.F.R. § 124.19(a)(2). Motion at 2-4. The simple answer is that NDN Collective did not, and nothing in its response filed on July 25, 2025 (“Motion Response”) changes that conclusion.

The facts are simple. NDN Collective did not file any comments on the draft permit or participate in any public hearing on the draft permit. No ambiguity on this issue exists in the record, which clearly shows a complete absence of any evidence demonstrating NDN Collective’s participation. Both Powertech and the Environmental Protection Agency Region 8 (“Region 8”) pointed this out. *See* Motion at 3. In their reply, Petitioners attempted to cure the defect in their Petition by for the first time citing to the public comments of Andrew Catt-Iron Shell, identifying him as NDN Collective staff for the first time, and providing an affidavit from him. Petitioners’ Reply at 6 (June 12, 2025) (“Petitioners’ Reply”). But Mr. Catt-Iron Shell did not identify that he was making his comments on behalf of NDN Collective when making them 2019, and he was not

employed by NDN Collective until 2020. Motion at 5. Powertech, therefore, moved to strike Petitioners' new arguments about Mr. Catt-Iron Shell raised for the first time in Petitioners' Reply.

The Motion Response devotes a mere two paragraphs, without legal support or analysis, to responding to the actual issue at hand. In the Motion Response, all they say is that Mr. Catt-Iron Shell is *currently* a representative of NDN Collective, and that he made comments at a public hearing *before* he was employed by NDN Collective. Motion Response at 2 ("Mr. Catt-Iron Shell is a representative of NDN Collective and [] he did make comment to the EPA during a public hearing on the challenged permits in Hot Springs, South Dakota in 2019."). The remainder of the Motion Response seeks to confuse and distract from the central issue by raising arguments (including one new, untimely argument) entirely irrelevant to the sole issue before the Environmental Appeals Board ("Board") in consideration of the Motion.

I. The New Information Raised in the Petitioners' Reply and the Reply Declaration Fundamentally Alter Petitioners' Argument and Must be Stricken

A. The New Information is the Type of Information the Board has Historically Deemed Impermissible When Raised in a Reply

New information raised in a reply has been deemed by the Board to be impermissible where the information "alter[s] the substance of [Petitioners'] argument in its reply brief in such a way that the argument takes on new and fundamentally different contours." *In re City of Keene*, 18 E.A.D. 720, 764 (EAB 2022). Petitioners assert, without analysis, that the new information contained in Petitioners' Reply and the Reply Declaration is not "new and fundamental" because the information "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." Motion Response at 2.

Petitioners' bald assertion that clarification of these facts is self-evidently not new and fundamental information is at odds with the basic facts and history of the case as described in detail in the Motion. Petitioners' petition filed on April 11, 2025 ("Petition") merely stated that "members and staff of NDN Collective participated in the October 5, 2019 public hearing on the draft permits." Petition at 6; *See also* Motion at 2. Both Powertech and Region 8 read this statement in the most natural way possible, that active members and staff of NDN Collective at the time of the hearing participated in the hearing on NDN Collective's behalf. *See* Motion at 3. Though Powertech noted in its response to the Petition filed on May 12, 2025 ("Powertech Response") that such a statement was legally insufficient due to its vagueness, Powertech nonetheless scoured the October 5, 2019 public hearing transcript and did not identify any reference to NDN Collective or any information that would have allowed Powertech to connect a specific commenter with NDN Collective. Powertech Response at 10; Motion at 3. Ultimately, lacking any evidence that NDN Collective had met its threshold requirement, Powertech and Region 8 both argued that NDN had failed to meet the requirement based on available evidence in the record. *See* Motion at 2-4.

Based on this history of the case, the information regarding Mr. Catt-Iron Shell in Petitioners' Reply and the Reply Declaration is, in fact, clearly "new and fundamental" information that alters the substance and contours of Petitioners' argument. Without it, NDN Collective failed to demonstrate standing in the Petition. First, the introduction of this information provides the missing link that would have allowed Powertech and Region 8 to evaluate and more precisely contest the standing of NDN Collective in their responses to the Petition. Second, and more critically, the fact that Mr. Catt-Iron Shell was not on staff at NDN Collective at the time of his public comment raises two new novel legal issues, precisely described by Powertech in the Motion, that Powertech and Region 8 surely would have fully analyzed and briefed had the

information been timely provided: (1) whether an individual that comments in a public comment period and does not identify himself as a member or staff of an organization can nonetheless satisfy such organization's threshold participation requirement under 40 C.F.R. § 124.19(a)(2); and (2) whether an individual that was not a member or staff of an organization at the time of making a public comment, but is later hired as staff of such organization prior to an appeal, can satisfy that organization's threshold participation requirement under 40 C.F.R. § 124.19(a)(2). Motion at 4-6. These issues are fundamental to the question of whether NDN Collective met its threshold requirement and could not have been foreseen based on the information provided in the Petition.

Even if Petitioners' strained reading of its statement in the Petition is true and Powertech and Region 8 could have understood the term "members and staff of NDN Collective" to include present-day staff that were not on staff at the time of the hearing, the new information in Petitioners' Reply and the Reply Declaration is at best an untimely attempt to cure Petitioners' failure to plead NDN Collective's standing with legally sufficient specificity. Powertech Response at 10.

B. Petitioners' Response Lacks Legal Support

After alleging that the purpose of the Reply Declaration is to clarify that Mr. Catt-Iron Shell is currently a representative of NDN Collective and that, separately, Mr. Catt-Iron Shell participated in the public hearing, Petitioners make another unsupported claim: that "[n]othing more is required by EPA's relevant regulations." Motion Response at 2. Petitioners make no attempt to support this statement with case law or any analysis of the plain language of applicable regulations. In fact, Petitioners do not even cite to the regulations that purportedly support this view. This lack of support demonstrates the novelty of the position Petitioners are attempting to take at this late stage in the proceedings, and thus, demonstrates the prejudice faced by Powertech

if Petitioners' new argument is considered by the Board without an opportunity by Powertech to substantively respond.

Powertech agrees with Petitioners that further briefing on these untimely raised and novel issues would unnecessarily consume Board and party resources. Thus, the appropriate remedy is to strike these arguments. However, as demonstrated above, if the Board does consider these issues, then fairness dictates that Powertech must be granted an opportunity to fully evaluate these issues and respond.

II. Petitioners' Remaining Arguments are Outside the Scope of the Motion and Should not be Considered

Petitioners make two additional arguments in the Motion Response: (1) the applicable regulations are meant to be construed broadly with the purpose of promoting public participation; and (2) the NDN Collective may obtain standing without having participated in the public comment process where the issues or arguments were not reasonably ascertainable. Motion Response at 2-4. The Motion seeks only to strike or otherwise allow for further analysis of the very limited information establishing Mr. Catt-Iron Shell as the representative of NDN Collective. This information was relied upon by Petitioners' Reply solely to support their position that "NDN Collective staff attended and commented during public hearings on the draft permits on October 5, 2019." Petitioners' Reply at 6. Any attempt by Petitioners to raise arguments involving alternative pathways to standing that do not rely on having directly participated in a public hearing are entirely irrelevant to the only issue that is properly before the Board in considering the Motion, and thus, cannot form a basis for denying the Motion.

Nonetheless, these other arguments do not support Petitioners' position. The first argument, that the regulations are meant to be construed broadly to promote public participation, constitutes yet another new substantive argument that has been untimely raised, and thus, should

not be considered. *See City of Keene*, 18 E.A.D. at 764. Petitioners could have presented this alternative argument for standing in the Petition, but failed to do so, and now attempt to raise it for the first time in response to an unrelated motion. The Board should not allow this.

Additionally, Petitioners' reliance on *Adams v. U.S. EPA*, 38 F.3d 43 (1st Cir 1994) and *In the Matter of Broward County, Florida*, NPDES Appeal 92-11 (1993) is unavailing. Petitioners cite *Adams* and *Broward* for the proposition that "[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." Motion Response at 2-3 (quoting *Adams*). Application of this principle to the present case would be an aggressive and unsupported expansion of the principle as laid out in *Adams* and in contradiction of *Broward*.

In *Adams* the petitioner did submit public comments. *Adams*, 38 F.3d at 52 ("Adams and other participants in the public comment period submitted statements"). While *Adams* does support the position that a party that satisfied its threshold obligation of submitting public comments can raise issues that were solely raised by other commenters as part of its appeal, nothing in the decision supports the exponentially broader proposition that a party that did not comment at all has standing to appeal on the basis of comments raised by others. *Broward* involved regulations for appeals of NPDES decisions that no longer exist. *Broward*, NPDES Appeal 92-11 at 713 (Referencing 40 C.F.R. §§ 124.74, and .91). Those regulations allowed parties to request an evidentiary hearing without having participated in the public comment process. 40 C.F.R. § 124.74 (1992) (Allowing "any interested person" to request an evidentiary hearing). Requesting an evidentiary hearing, however, was a threshold requirement to an appeal. 40 C.F.R. § 124.91 (1992). The Board in *Broward* cited this threshold requirement as an express limitation on its conclusion that parties may otherwise raise issues on appeal that were raised in the public

comments of others. *Broward*, NPDES Appeal 92-11 at 714, n.19. Therefore, *Broward* and *Adams* stand for the proposition that Petitioners must have otherwise satisfied all threshold regulatory requirements for standing *before* being able to raise issues on appeal that were solely raised by other parties in public comment.

The second argument, that parties may raise arguments on appeal that were not reasonably ascertainable during the public comment period was raised in the Petition. Petition at 7. This argument was thoroughly rebutted in the Powertech Response and need not be rehashed here. Powertech Response at 5-6, 8-11.

Because these arguments are irrelevant to the only issue raised by the Motion and, in the case of the first argument is untimely, the Board must not consider these issues when ruling on the Motion. Because the arguments otherwise fail on the merits, they do not support a finding of standing for NDN Collective.

Conclusion

For the foregoing reasons the Board should strike the Affidavit and references to Andrew Catt-Iron Shell in Petitioners' Reply. Alternatively, the Board should grant Powertech leave to file a surreply to address the new legal issues raised by the introduction of the new argument regarding Mr. Catt-Iron Shell.

Respectfully submitted,

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STATEMENT OF COMPLIANCE WITH WORD LIMITATION

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

CERTIFICATE OF SERVICE

I certify that the foregoing Reply in Support of Powertech's Motion to Strike and Alternative Motion to File Surreply in the matter of Powertech (USA) Inc., Appeal No. UIC 25-01, was filed electronically with the Environmental Appeals Board's E-filing System and served by email on the following persons on August 4, 2025.

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