



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

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

ORDER STAYING PROCEEDINGS FOR SIXTY DAYS

On February 16, 2021, the U.S. Environmental Protection Agency, Region 8 (“Region”) filed a motion seeking a 120-day stay of proceedings before the Environmental Appeals Board (“Board”). The current deadline for the Region to file its response to the petition (along with a certified index and relevant portions of the administrative record), and for Powertech to file a response to the petition, if it so chooses, is Wednesday, February 24, 2021.

The Region requested the stay to “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.” Motion for Stay of Proceedings (Feb. 16, 2021) (“Region’s Motion”). In support, the Region cited a recent executive order that directs federal agencies to review past EPA actions to determine if they are consistent with, among other things, the policy of “improv[ing] public health and protect[ing] our environment, and ensur[ing] access to clean air and water.” *See* Exec. Order No. 13,990, 86 Fed. Reg. 7037 (Jan. 25, 2021). In addition, the Region explained that there is pending litigation in the U.S. Court of Appeals for the D.C. Circuit challenging a recent decision by the Nuclear Regulatory Commission (“NRC”), claiming, inter alia, that the NRC “failed to satisfy the substantive and procedural

duties...required by the National Historic Preservation Act [(“NHPA”)].” Region’s Motion at 2 (quoting *Oglala Sioux Tribe v. United States Nuclear Regulatory Comm’n*, D.C. Cir. No. 20-1489 (Statement of Issues, filed Jan. 11, 2021)). The Region stated that the challenge to the NRC action is relevant to the matter before the Board because the Region relied on the NHPA compliance work conducted by NRC. *Id.* The Region also claimed that Petitioner will not be prejudiced because the permits are stayed during the appeal process, and that 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 occur. *Id.* at 3. Finally, the Region stated that it contacted Powertech’s representatives and Petitioner’s attorney to ascertain whether the parties would concur or oppose this motion. *Id.* The Region reported that Petitioner did not oppose the stay, but that Powertech opposed the motion. *Id.*

On February 17, 2021, the Environmental Appeals Board (“Board”) issued an order setting a deadline for Powertech to respond to the Region’s motion by no later than February 19, 2021. Order Setting Deadline for Response to Region’s Motion for Stay of Proceedings 2 (Feb. 17, 2021).

Powertech filed a response stating that it does not object to providing the Region “with sufficient time to ‘allow discussions with the new Administration and review of the matter by newly appointed Agency decision makers.’” Powertech Response to Respondent’s Motion for Stay of Proceedings 1 (Feb. 19, 2020). However, Powertech opposes the duration of the stay requested by the Region arguing that 120 days is excessive; that EPA already received a 30-day extension expressly for the purpose of allowing discussions with the new Administration; and that the Government has requested stays of only 60 days in other proceedings to comply with Executive Order 13,990. *Id.* Powertech also disagrees with the Region’s assertion that

Powertech will not be prejudiced by a stay. *Id.* It claims that it will be “prejudiced by any further delays in this case because this proceeding is preventing the permits at issue (which Powertech has been seeking since 2013) from becoming effective, and Powertech’s efforts to obtain all other necessary approvals, including those before the State of South Dakota, may be hindered by any delays in the effectiveness of those permits.” *Id.* at 1-2. Finally, Powertech also submits that the proceedings in the U.S. Court of Appeals for the D.C. Circuit the Region referenced in its motion, and the Court’s ultimate decision, “would not affect the issues that are properly before the Board in this Petition for Review.” *Id.* at 2.

Upon consideration of the Region’s motion and Powertech’s response, the Board concludes that a stay of proceedings for sixty days is reasonable in this case to allow additional time for the Region to brief the new Administration on this matter, and to allow time to conduct any review in light of the executive order. In addition, a sixty-day stay would allow time for the Region to present the Board a coordinated legal position for these appeals. The Board notes that under longstanding EPA procedures, the Agency’s regional and Headquarters offices must coordinate with respect to their views on issues raised in permit appeals so that the positions presented to the Board consistently represent those of the Agency as a whole, which properly takes into account the views of a new Administration. *See* Memorandum from Ray Ludwiszewski, Acting Gen. Counsel, Office of General Counsel, and Herbert H. Tate, Jr., Ass’t Adm’r, Office of Enforcement, U.S. EPA, to Reg’l Counsels, Assoc. Gen. Counsels, and Enforcement Counsels (Jan. 26, 1993) (attaching procedures for coordination of matters before the Environmental Appeals Board); *see also In re Evoqua Water Techs. LLC*, RCRA Appeal No. 18-01 (Order for Further Briefing on Evoqua’s Motion for Stay of Permit Provisions Pending Board Review) (Dec. 14, 2018) (directing Region to confer with EPA’s Office of General

Counsel to ensure that Region's responses reflect Agency's views). The Board's decision here is consistent with other Board rulings on similar requests and consistent with the regulations.

Cf. In re Granite Shore Power Merrimack LLC, NPDES Appeal Nos. 20-05 and 20-06 (Order Granting Region 1's Motion for Continuance of Oral Argument Date and Abeyance) (Feb. 9, 2021) (granting, among other things, a 60-day abeyance to allow for consultation with EPA leadership in new Administration in light of Executive Order 13,990); 40 C.F.R. § 124.19(o).

Accordingly, the Board grants in part the Region's motion. This matter is now stayed for sixty days until **Monday, April 26, 2021**. In addition, on or before **Monday, April 19, 2021**, the Region shall file a status report addressing the status of its review and consultations and the anticipated timing of the Region's further actions on this permit decision.¹

So ordered.

Dated: Feb 23, 2021

ENVIRONMENTAL APPEALS BOARD

By: 
Mary Kay Lynch
Environmental Appeals Judge

¹ Nothing in this order should be interpreted as representing a judgment or determination by the Board of the relevance, or lack thereof, of the pending litigation in the D.C. Circuit Court of Appeals to the matter before us.

CERTIFICATE OF SERVICE

I certify that copies of the foregoing *Order Staying Proceedings for Sixty Days* in the matter of Powertech (USA) Inc., UIC Appeal No. 20-01, were sent to the following persons in the manner indicated.

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Dated: Feb 23, 2021



Eurika Durr
Clerk of the Board