



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

ORDER GRANTING MOTION TO STAY SUBJECT TO CONDITIONS

The Oglala Sioux Tribe ("Petitioner" or "Tribe") filed the instant petition for review of two Underground Injection Control ("UIC") permits issued by U.S. Environmental Protection Agency, Region 8 ("Region") to Powertech (USA) Inc. in connection with Powertech's Dewey-Burdock In Situ Uranium Recovery Project. The Tribe's challenges to the UIC permits include a claim that the Region failed to comply with section 106 of the National Historic Preservation Act ("NHPA") in issuing the two permits. Pending before the Environmental Appeals Board ("Board") is a motion filed by the Region requesting to further stay this matter until the D.C. Circuit Court of Appeals ("D.C. Circuit" or "Court") resolves a "crucial National Historic Preservation Act (NPHA) [sic] question" pending before the Court. Status Report and Motion for Stay of Proceedings at 1 (April 19, 2021).

The matter pending in the D.C. Circuit involves challenges by the Oglala Sioux Tribe, and others, to the Nuclear Regulatory Commission ("NRC") licensing decision that granted Powertech (USA) Inc. a Source Materials License for its Dewey-Burdock Project referenced above. The action before the D.C. Circuit claims, among other things, that the NRC failed to comply with "substantive and procedural duties" under the NHPA. Id. at 2. In its motion for a stay the Region states that the pending challenge to the NRC action in the D.C. Circuit is

relevant to the matter before the Board “because in issuing the UIC permits to Powertech, the Region chose to comply with NHPA section 106 by designating the NRC as the lead federal agency for that purpose[,]” and “[t]hus, the Region’s compliance with section 106 is based on the NRC’s – which is at issue in the D.C. Circuit.” *Id.* The Region represents that “if the D.C. Circuit were to find the NRC in noncompliance with section 106, the Region would request a remand of the permits in this proceeding to allow the Region to evaluate other approaches to establishing NHPA compliance.” *Id.* at 4. Finally, in support of its request for a stay pending the D.C. Circuit litigation, the Region references a 2010 Order Granting Stay of Proceedings that the Board issued in a Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) matter. *Id.* (citing *In re Titan Tire Corp. & Dico, Inc.*, CERCLA § 106(b) Petition No. 10-01 (EAB Dec. 10, 2010) (Order Granting Stay of Proceedings)). The Region states that it contacted the parties and that the Tribe does not oppose the motion but that the permittee, Powertech, indicated that it could not provide a position without an opportunity to read the motion first. *Id.* at 6.

On April 21, 2021, the Board issued an order setting a deadline for Powertech to respond to the Region’s motion for the stay. The order directed Powertech, if it decided to oppose the Region’s motion, to “include the grounds for its opposition, including support for its statement in its prior pleading that the proceedings in the D.C. Circuit case ‘regardless of the outcome, would not affect the issues that are properly before the Board in this Petition for Review’” and to “explain its prior statement that a stay of proceedings before the Board would delay or affect the proceedings before the State of South Dakota.” *Order Setting Deadline for Response to Region’s Motion for Further Stay* at 3 (EAB Apr. 21, 2021).

On May 18, 2021, Powertech filed its response opposing the Region’s motion to further stay proceedings. *See* Opposition of Powertech (USA) Inc. to Respondents’ Motion for Further Stay (May 18, 2021). In its response Powertech argues that “[t]he premise of the Region’s Motion[,]. . . that the resolution of the NRC Case could have a material bearing on the issues presented in this proceeding,” is incorrect, and that “[a]ny further delay in this proceeding will be prejudicial to Powertech.” *Id.* at 2. According to Powertech, any decision by the D.C. Circuit has no bearing on the matter before the Board because “[i]t is only the Region’s permitting decisions that are under review here, not the NRC’s compliance in a different administrative proceeding”; the Board’s scope of review in this case is limited to challenges that “pertain exclusively to the UIC program”; and Petitioner failed to meet threshold procedural requirements for Board review. *Id.* at 2, 8-10. As to why additional delays will be prejudicial, Powertech notes that this matter has already been stayed for more than 130 days and claims that any further delays in reviewing the UIC permits will be extended by the anticipated appeal of any final action by the Board. Powertech further states that “all proceedings in South Dakota are currently suspended pending effective EPA UIC permits with no guarantees of resumption in the face of opposition.” *Id.* at 14-17.

On May 28, 2021, the Tribe filed a reply supporting the Region’s motion to stay this matter, asking that the Board “not entertain Powertech’s impermissible attempts to brief the merits of the Petition for Review in its Response,” and disputing Powertech’s claim about further delays in state permit proceedings. Petitioner Reply to Powertech (USA) Inc. Response in Opposition to EPA Motion to Stay Proceedings at 2 (May 28, 2021); *see id.* at 4-6. The Tribe supports the Region’s position that there is significant overlap between the proceedings before the Board and the D.C. Circuit, and that the decision in the D.C. Circuit case would have a

significant effect on the proceedings before the Board. *Id.* at 1, 4-5 (discussing its initial opening brief in the D.C. Circuit case and the overlap between the issues before the Board and those in federal court). Finally, with respect to the state permit proceedings, the Tribe argues that Powertech has not demonstrated that “a stay in this case will necessarily lead to any delay in the long-stayed South Dakota state permit proceedings,” and that Powertech’s argument of delays at the state level are simply “speculative and tenuous allegations of prejudice.” *Id.* at 6.

Upon consideration of the Region’s motion and responses of the other parties, as well as the pleadings to date in the pending D.C. Circuit litigation, the Board concludes that a stay of proceedings, with conditions, until after full briefing in the D.C. Circuit is reasonable and appropriate in this case. 40 C.F.R. § 124.19(o). We do so mindful of Powertech’s interest in securing its permits and proceeding with its Dewey-Burdock Project. The Board is committed to adjudicating the claims before it in an expeditious and fair manner, and our conclusion is based on our experience and assessment that a stay at this time will result in a more efficient and fair resolution of the pending petition for review.

We first note that the Board decision to grant a stay is based on the facts in a particular case; the Board does not issue stays as a matter of course or automatically in petitions filed under CERCLA or petitions filed under other statutes. The Region’s initial reference to the Board’s order in the *Titan Tire Corporation* case is not dispositive. However, the additional filings of the parties are instructive and helpful to the Board in resolving the motion based on good cause. The recent pleadings in the D.C. Circuit clearly show that the overlapping issues are subject to adjudication by the same parties, in the same time frame, in two different forums. In the case pending before the Board, the Region relies on the consultation and applicable programmatic

agreement that the Tribe is challenging in the D.C. Circuit. For the Board to proceed in the face of this overlap is inefficient and could lead to incongruous results.

Moreover, Powertech's arguments that the NHPA issue under review in the D.C. Circuit has no bearing on the NHPA issue before the Board and that the Board's scope of review in this case is limited to challenges that "pertain exclusively to the UIC program" are incorrect. First, the Region noted, if "the lead agency is in non-compliance with Section 106, so is the agency that designated it as lead." Status Report and Motion to Stay of Proceedings at 4 (April 19, 2021). Second, the Region has represented that if the D.C. Circuit were to find the NRC in noncompliance with NHPA section 106, it would request in this proceeding a remand of the permits. This supports the conclusion that the outcome of the action before the D.C. Circuit could well have an impact on the matter before us. And third, applicable regulations require consideration of other federal laws, including the NHPA, when a Region issues a UIC permit. 40 C.F.R. § 144.4; *see, e.g., In re MCN Oil and Gas Co.*, UIC Appeal No. 02-03, at 19 n.15 (EAB Sept. 4, 2002) (Order Denying Review); *In re Brine Disposal Well*, 4 E.A.D. 736, 742 n.6 (EAB 1993).

Thus, the facts and circumstances of this matter, and the principles of judicial and administrative economy, counsel in favor of a stay at this time, and we grant the Region's motion subject to the following conditions. 40 C.F.R. § 124.19(o). This matter is stayed until such time as the D.C. Circuit renders a decision disposing of the challenge to NHPA compliance in connection with the Dewey-Burdock Project that is pending before the Court. The stay is conditioned on the following: On or before **Thursday, August 5, 2021**, the parties shall file a joint status report addressing the status of the D.C. Circuit litigation, including the status of the NHPA issues under review and any other information that the parties believe may be relevant to

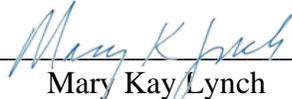
the petition pending before the Board. Thereafter, the parties will file an updated joint status report on **Thursday, October 7, 2021**, and on **Thursday, December 2, 2021**. The parties will also apprise the Board within two weeks of any decision by the D.C. Circuit relevant to the NHPA issue or other issues potentially affecting the Board adjudication of the pending petition, and recommend next steps for orderly resolution of the present petition. In addition, the parties will apprise the Board within two weeks of any settlement involving issues presented in the petition pending before the Board.

The current briefing schedule in this matter continues to be stayed and held in abeyance for the Region's response to the petition, any response to the petition Powertech may wish to file, and other pleadings including responses to the pending motions and pleadings filed on May 18 and May 28, until directed otherwise by the Board. No motions or other issues will be addressed by the Board at this time.¹ Notwithstanding this order, the Board may lift the stay or take other appropriate action in this matter prior to conclusion of the D.C. Circuit litigation, or at any other time in accordance with the Board's responsibility to manage its docket.

So ordered.

Dated: Jun 10, 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 on the merits of the case.

CERTIFICATE OF SERVICE

I certify that copies of the foregoing *Order Granting Motion to Stay Subject to Conditions* 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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