

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

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

**MOTION TO HOLD RESPONSES TO PERMIT APPLICANT’S
MOTION TO STRIKE IN ABEYANCE**

Petitioner Oglala Sioux Tribe (“Tribe”), through counsel, moves to hold in abeyance any response deadlines to permit applicant Powertech (USA) Inc.’s (“Powertech”) Motion to Strike portions of the Tribe’s Petition for Review, and to set a schedule for the Tribe to file a single reply to all merits responses in due course as contemplated by this Board’s regulations and practice standards, and pending the resolution of the stay request filed by Region 8.

The Board’s April 21, 2021 Order Setting Deadline for Response to Region’s Motion for Further Stay, at 3, explicitly states that “[t]he current briefing schedule for the Region’s response, any response Powertech may wish to file, and other pleadings in this matter are now stayed pending resolution of the Region’s motion.” However, despite this universal stay on all pleadings, Powertech filed a Motion to Strike National Environmental Policy Act Challenges (“Powertech Motion”) on May 18, 2021, concurrently with the Opposition of Powertech (USA) Inc. to Respondents’ Motion for Further Stay. The Tribe thus files this Motion only in an abundance of caution so as to ensure its proper opportunity in the future to adequately respond to

all merits issues. Counsel for the Tribe conferred with counsel for the other parties concerning the present Motion. Powertech opposes this Motion. Region 8 does not oppose this Motion.

Powertech's Motion not only violates the April 21 Order, it subverts the orderly procedures for substantive briefing and resolving the pending Petition to Review by attempting to litigate the merits of the Petition through piecemeal motions practice that cannot supplant the specific Petition for Review briefing procedures. 40 C.F.R. § 124.19(b)(3). The Powertech Motion also runs directly counter to the pending Status Report and Motion for Stay of Proceedings filed on April 19, 2021 by EPA Region 8. Given the pending Region 8 Motion for Stay, the Board should affirmatively hold the deadline for Responses to the Powertech Motion in abeyance pending a ruling from the Board on the Region 8 Motion for Stay. Whether the Region 8 Motion for Stay is granted or not, any Response deadline to Powertech's Motion should be revised to coincide with the normal, orderly, merits briefing schedule established by rule. See 40 C.F.R. § 124.19(b) and (c).

Moreover, the Board should treat the Powertech Motion as the response brief of "[a] permit applicant who did not file a petition" (40 C.F.R. § 124.19(b)(3)) and schedule any further briefing in accordance with resolution of the EPA Motion for Stay. 40 C.F.R. § 124.19 (n) (providing EAB authority to ensure procedures and orders are followed).

Powertech's Motion has no Basis in Law

Powertech's Motion to Strike cites no authority for the EAB to conduct merits briefing adjudication through a motion to strike portions of a Petition for Review. 40 C.F.R. § 124.19 (f)(2) ("[a] motion must state with particularity the grounds for the motion, the relief sought, and the legal argument necessary to support the motion."). The Powertech Motion cites extensively to only generalized standards in 40 C.F.R. Part 124 throughout its argument urging the Board to

foreclose consideration of NEPA components of the Tribe's Petition for Review. However, the Powertech Motion lacks any particular citation to authority providing for piecemeal merits-based attacks on a Petition for Review via motions practice. The Tribe's research has identified no EAB authority providing for a party to force the Board to proceed to merits briefing on a Petition for Review via motions practice, prior even to submission of the administrative record.

"The part 124 rules provide a system by which the 'orderly transaction of business' -- namely permit litigation -- takes place before the Board." *In re Peabody Western Coal Co.*, 14 E.A.D. 712, 717 (E.P.A. August 13, 2010). The Board has previously "exercised discretion to relax or fill gaps in the appellate procedures for part 124 permits." *Id.* In circumstances not present here, when there is an "absence of specific regulatory authority providing for motions [of a particular type], a question arises as to whether the Board has discretionary authority or any other legitimate basis for ruling on such motions." *Id.* at 715. *Peabody*, and cases discussed therein, survey a range of situations warranting EAB consideration outside the specific system set out in the part 124 rules that applies to Petitions for Review.

In response to growing complexity and a two-tiered approach to Petitions for Review, the 2013 "revision of § 124.19 simplifies the review process and promotes judicial economy by clarifying that one complete round of briefing will occur" to allow the Board to review the merits of an appeal. 78 FR 5281, 5282 (Jan. 25, 2013). Revised section 124.19(a) provides specific regulatory standards and authority for adjudicating Petitions for Review. Revised section 124.19(b) sets out a comprehensive procedure for each of the parties to submit briefing that does not contemplate merits-based motions practice. Powertech identifies no gaps that would be filled by allowing Section 124.19(f) motions to supplement Section 124.19(b) briefing.

Notably, the rules provide for the Region to file a certification of the administrative record along with its response brief. 40 C.F.R. § 124.19(b)(2). After that filing, the Petitioner has the opportunity to file a reply, informed by both the record and the arguments presented by responses. 40 C.F.R. § 124.19(c)(2). This orderly system allows all parties the opportunity to fully brief the issues raised in the Petition based on the administrative record, and allows the Board to grant or deny the Petition for Review, or invite further briefing, with the benefit of complete briefing supported by the administrative record.

The Tribe submits that such there is no basis (or need) to find or create authority for general motions practice to supplant the detailed briefing system the Board's regulations provide for resolution of Petitions for Review. The 2013 "revised rule adds provisions imposing procedural rules governing the content and form of filings for briefs and motions practice [intended to] improve the quality and consistency of filings before the Board, which will also contribute to greater efficiency." 78 FR 5281, 5283. Briefing contemplated by section 124.19(b) comprehensively address presentation of the merits of Petitions for Review to the Board and provides no gaps to fill with *ad hoc* merits motions.

In short, Powertech's Motion not only lacks any citation to authority sanctioning the requested relief, it is contrary to law and should not be granted.

The EAB Should Exercise its Discretion and Treat the Powertech Motion as a Response

The Board asked Powertech to explain its position opposing EPA's Motion for Stay. April 21, 2021 Order Setting Deadline for Response to Region's Motion for Further Stay. Instead of heeding the intent of the Board's Order, Powertech subverted the orderly proceedings with a Motion to Strike that attacks the substance of the Tribe's pending Request for Review. Despite the caption, Powertech's Motion to Strike is undeniably Powertech's merits argument

for the Board to deny the Petition for Review. Powertech’s subversion of the orderly briefing of the pending request for review by filing a generalized motion to strike (40 C.F.R. §124.19(f)) warrants Board “measures necessary for the efficient, fair, and impartial adjudication of issues arising in an appeal under this part including, but not limited to, imposing procedural sanctions against a party who, without adequate justification, fails or refuses to comply with this part or an order of the Environmental Appeals Board.” 40 C.F.R. § 124.19(n).

The 2013 revised rule eliminated the two-step approach to appeals by clarifying that “substantive briefing occurs at the outset of the appeal followed by one substantive review process and that a second round of substantive briefs will not occur as a matter of course...” 78 FR 5281, 5282. Nothing in the subsequent 2020 rule revision altered this orderly process. Here, where Powertech has filed what amounts to substantive Section 124.19(b) briefing, the appropriate Board action is to treat the Powertech Motion as the permit applicant’s response to the Tribe’s Petition for Review. Id.

The unwarranted disruption caused by Powertech’s filing provides good cause for the Board to grant the Tribe’s request to fashion an Order that establishes the “efficient, fair, and impartial adjudication” of the pending Request for Review. 40 C.F.R. § 124.19(n). Such an Order is proper to avoid prejudice to the Tribe. First, the Tribe is entitled to reasonable reliance on the regulations when prosecuting its appeal. Second, Powertech’s attempts to frontload merits briefing denies the Tribe the ability to consider or support its Petition for Review with the certified administrative record. Third, Tribe should be allowed to address all arguments against its Petition to Review in a single reply.

Conclusion

In order to preserve an orderly appeal process, conserve resources of the Board and all parties, and avoid prejudice, the Board should: 1) hold the Response deadlines to the Powertech Motion in abeyance pending resolution of the Region 8 Motion for Stay and re-establish the Response deadlines in conformance with the section 124.19(b) and (c) deadlines; 2) deem Powertech's substantive filings as the permit applicant's response to the Tribe's Petition for Review (40 C.F.R. § 124.19(b)(3)); 3) conform any relief granted on this motion with the resolution of the pending stay request. 40 C.F.R. § 124.19(n).

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STATEMENT OF COMPLIANCE WITH WORD LIMITATION

This Motion complies with the requirement of 40 C.F.R. § 124.19(f) that motions not exceed 14,000 words. This Motion is approximately 1525 words in length.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion were served, by email on the following persons, this 28th day of May, 2021:

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