

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

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

MOTION TO AMEND PETITION FOR REVIEW

Pursuant to 40 C.F.R. § 124.19(f), and in accordance with this Board’s Order dated March 22, 2023, Petitioner Oglala Sioux Tribe (“Tribe”), through counsel, moves for leave to supplement its Petition for Review.¹ The original Petition for Review was filed in this matter on December 24, 2020. Since that time, almost 28 months ago, significant events have transpired which bear directly on this Board’s review of the matters raised in the Petition.

Specifically, in the intervening almost two and half years, the U.S. Nuclear Regulatory Commission and its professional staff have jointly developed and endorsed, in conjunction with the Oglala Sioux Tribe, a cultural resources survey protocol. This protocol was finalized in September of 2021 and demonstrates that the information related to cultural resources is not “unavailable” as Region 8 EPA’s decision effectively asserted when adopting the U.S. Nuclear Regulatory Commission Staff’s analysis and issuing the UIC licenses at issue in this case.

¹ As described in the March 22, 2023 Order, both EPA Region 8 and Powertech (USA) Inc. took no position on the Tribe’s submittal of this Motion. The March 22, 2023 Order thus specially authorized the instant Motion. Order at 2. See also 40 C.F.R. § 124.19(f)(2)(addressing conferral).

Further, in November 2022, Fall River County, South Dakota, the jurisdiction in which approximately half of the Dewey-Burdock project is proposed, passed by popular vote of the county residents an ordinance designating the mining of uranium a public nuisance. As such, the proposed mining project has been rendered ostensibly unlawful under the relevant local laws and regulations.

Significant changes in the scope of the project have been announced in regulatory documents filed by Powertech, and the entities that now control the project. In particular, Azarga published three “NI 43-101 Technical Report Preliminary Economic Assessment” reports that involve changes in the scope and use of the Dewey-Burdock facility and operations. The reports were published December 23, 2020, May 10, 2021, and August 10, 2021. For example, the results of sulfuric acid leaching at other sites will be shipped to Dewey-Burdock and for processing in three of the “four major solution circuits [...including] an elution circuit to remove uranium from the IX resin, a yellowcake precipitation circuit, and a dewatering, drying, and packaging circuit.” August 10, 2021 NI 43-101 Technical report at 74. These expanded activities – and the need for additional drilling in the area – affect the agency’s analysis of the project, including its cumulative impacts assessment of impacts from the construction and operation of wells associated with the proposal.

This Board does not appear to have a regulation specific to amending or supplementing a Petition for Review. However, some Board rulings demonstrate that the Board has regularly granted such requests where there was no discernible prejudice to the permittee because the amended or supplemental petition was filed before any responsive pleadings. In Re Indeck-Elwood, LLC, 13 E.A.D. 126, 139 n. 36 (2006). See also, In Re Zion Energy, LLC, 9 E.A.D. 701, 707 (denying leave to file supplemental petition because original petition was facially

deficient, agency and permittee merits responses had already been filed, and information sought to be supplemented was available at time of original filing). Further, the Board has allowed amendment or supplementation where the issue raised involved important policy considerations. In Re Indeck-Elwood, LLC, 13 E.A.D. 126, 139 n. 36 (2006).

Here, there have been no responsive pleadings filed on the merits to the Oglala Sioux Tribe's Petition for Review. Further, the issues at stake are significant and involve important policy considerations. Specifically, an important policy consideration exists as to whether and to what extent EPA Region 8 is obligated, prior to permit issuance, to comply with the National Historic Preservation Act requirements aimed at protecting the significant cultural resources of the Oglala Sioux Tribe and Lakota people generally. Further, an important policy consideration exists as to whether EPA Region 8 may issue a final and effective permit for an activity that is unlawful under local laws – as is the case here. Notably, this is not a case simply where the local permits have not yet been issued or where additional local government-imposed conditions on the proposed activity may arise. Rather, here, the proposed activity for which the EPA permits are sought has been declared a nuisance by virtue of a popular vote of the Fall River County citizens – rendering the activity presumptively unlawful. There is also a significant question presented by the changes in the project design and scope that have occurred between EPA Region 8's permitting decisions and the EAB review. The impacts of these and other changes the applicant may have made in the project design are properly addressed by the Board in these proceedings, alone and/or in combination with the issues raised in the initial Petition. Alternatively, EPA Region 8 may elect to withdraw the permit to review and conform the permitting analysis and decisions to the publicly announced changes.

As stated, the Board does not appear to have a regulation specifically addressing amendments or supplements to a Petition. However, the Federal Rules of Civil Procedure provide an apt corollary that supports the Board granting this Motion. Fed. R. Civ. P. 15(d) provides, in relevant part, that “[o]n motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented.” This Rule fittingly addresses the situation here warranting supplementation – where occurrences and events relevant to the proceedings happened after the date of the pleading to be supplemented.

Based on the foregoing, Petitioner Oglala Sioux Tribe moves the Board to accept the Supplemental Petition for Review filed herewith.

/s/ Jeffrey C. Parsons
Jeffrey C. Parsons
Roger Flynn
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, CO 81301
(970) 375-9231
stills@eclawoffice.org

Date: April 21, 2023

Attorneys for Petitioner
Oglala Sioux Tribe

STATEMENT OF COMPLIANCE WITH WORD LIMITATION

This Motion complies with the requirement of 40 C.F.R. § 124.19(f) that motions not exceed 7,000 words. This Motion is approximately 952 words in length.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion were served, by email on the following persons, this 21st day of April, 2023:

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

Michael Boydston
Office of Regional Counsel
EPA Region 8
1595 Wynkoop St.
Mail Code: 8ORC-LC-G
Denver, CO 80202
(303) 312-7103
boydston.michael@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
Attorneys for Powertech (USA) Inc.

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 Petitioner