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	)	

REPLY TO POWERTECH (USA) INC. RESPONSE
IN OPPOSITION TO EPA MOTION TO STAY PROCEEDINGS

Petitioner Oglala Sioux Tribe ("Tribe") hereby submits this Reply to permit applicant Powertech (USA) Inc.'s ("Powertech") Response in Opposition to Respondent EPA Region 8's Motion to Stay Proceedings pending resolution of the case currently pending before the United States Court of Appeals for the D.C. Circuit challenging the U.S. Nuclear Regulatory Commission license for the same uranium processing project at issue in this appeal. As the Petitioner in both this appeal and the D.C. Circuit Court of Appeals case, the Tribe provides the Board with this Reply in the hopes that the Board's ruling will further the conservation of the sovereign nation's resources in closely related federal proceedings and ensure efficient and orderly briefing of the pending Petition for Review.

The Stay is Warranted

The Region's Motion, unopposed by the Tribe, correctly asserts that any decision in the D.C. Circuit case "would have a significant effect on these proceedings," regardless of who prevails. Motion at 4. The Motion confirms that the D.C. Circuit's granting relief on the Tribe's claims could obviate the present appeal because a "crucial underpinning of the EPA's permitting

decision will have been removed." Id. at 4. Further, the preamble to the 2013 revision of the EAB rules confirms that conserving resources of the Board and parties through stays and remands are within the power and discretion of the Board. 78 FR 5281, 5282 (Jan. 25, 2013) *citing Mich. Dep't of Envtl. Quality v. United States EPA*, 318 F.3d 705, 708 (6th Cir. 2003) (EAB "has the discretion to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it."). Lastly, the Board should not entertain Powertech's impermissible attempts to brief the merits of the Petition for Review in its Response.

In its Order requesting a Response from Powertech, the Board stated "[i]f Powertech decides to oppose the motion, it must 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.'" April 21, 2021 Order Setting Deadline for Response to Region's Motion for Further Stay at 3. Further, the Board directed Powertech to "also explain its prior statement that a stay of proceedings before the Board would delay or affect the proceedings before the State of South Dakota." Id. Powertech's filing effectively does neither.

Powertech asks the Board to Act Contrary to Its Rules

Instead of heeding the Board's explicit instructions and discussing the issues involved in the D.C. Circuit case, Powertech chose instead to file what amounts to an ill-timed merits brief regarding the Tribe's National Historic Preservation Act ("NHPA") claims. Powertech goes so far as to attempt to use its Response to request that the Board dismiss all of the Tribe's NHPA claims in their entirety. Powertech Response at 13. The Board should reject such an attempt to game the procedure in this matter, as the Board's regulations unambiguously require that "[a]

request for an order or other relief must be made by written motion …" 40 C.F.R. § 124.19(f)(1). Apart from the inappropriateness and disorderly effect of attempting to litigate the merits of a petition for review in motion practice related to procedural matters, Powertech's dramatic request would cause the Board to run afoul of its 2013 "revised rule [that] 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.

Powertech's unmoored requests for summary relief do recognize that the Board's procedural rules require that the Board decide the Tribe's Petition for Review "based on the administrative record of the UIC permitting proceeding." Powertech Response at 2. However, the administrative record has not been, and will not be, certified or filed until the Regional Administrator files a response brief. 40 C.F.R. § 124.19(b)(2). Although the Powertech filing purportedly involves the stay, the company prematurely urges the Board to impermissibly dismiss all of the Tribe's NHPA arguments, without benefit of a record or complete briefing. Id. at 13.

Powertech's request would prejudice the Tribe by eliminating its ability to file a reply that is informed by the responses and the administrative record. 40 C.F.R. § 124.19(c)(2). Notably, Powertech does not assert any jurisdictional or other defenses. Instead, Powertech argues that the Tribe's NHPA claims should not prevail on their merits – arguments that are properly offered in a permit applicant's response to a petition for review. 40 C.F.R. § 124.19(b)(3). The Board should forcefully reject Powertech's baseless disregard of notice and comment rules that provide for the orderly course of proceedings.

There is Significant Overlap in the Proceedings

In its zeal to prematurely brief the merits of the Petition for Review, Powertech failed to recognize and address, let alone dispel, the significant overlap between the issues in this appeal and the case in the D.C. Circuit. In its Response, Powertech merely asserts that "a decision in the NRC Case should have no bearing on the issues properly raised before the Board." Powertech Response at 2 (emphasis added). Indeed, Powertech's only direct response to this Board's request to discuss the overlap in the cases is limited to a single incongruous sentence. Id. at 13. In that sentence, Powertech asserts, without citation, that the NHPA issues are somehow not properly before the Board and that "nothing would change the fact that the Region's decision to sign the [Programmatic Agreement] was *reasonable when it was made*."[1] Id. (emphasis supplied). This argument is irrelevant. Even if true, this fact does not undermine the Region's legally supported demonstration in its original Motion that "[I]f the lead agency is in non-compliance with Section 106, so is the agency that designated it as lead." EPA Status Report and Motion for Stay of Proceedings at 4 *citing* the Advisory Council on Historic Preservation's Frequently Asked Questions About Lead Federal Agencies in Section 106 Review.

The NHPA issues addressed by Powertech – including the lack of compliance with the NHPA, the need for cultural resource surveys, and the efficacy and legality of the Programmatic Agreement – are all directly at issue in the D.C. Circuit. Notably, despite having been filed on April 19, 2021, Powertech fails to reference or otherwise address the Tribe's Initial Opening

[1] As referenced *infra*, part of the pending D.C. Circuit challenge is that the 2014 PA did not survive the NRC findings that required cultural resource surveys were not conducted. *Oglala Sioux Tribe v. United States NRC*, 896 F.3d 520, 525 (2018) (discussing NRC "findings that the Staff had failed to comply with NEPA and the National Historic Preservation Act.").

Brief in the D.C. Circuit case.[2] The Tribe attaches this Brief as Exhibit 1 hereto. The Brief demonstrates the substantial overlap between this appeal and the D.C. Circuit case – particularly with regard to the NHPA claims. Specifically, starting on page 23, the Tribe argues that NRC failed to comply with the NHPA. Starting on page 32, the Tribe directly contests the legality of the Programmatic Agreement. Starting on page 25, the Tribe addresses the inadequacies of the NRC's attempts to conduct a cultural resources survey.[3]

As the briefing in the Circuit Court is not complete, there will undoubtedly be additional detailed discussion of these issues in the federal government's, Powertech's, and the Tribe's subsequent briefs. The point remains, however, that the Tribe has directly challenged NRC's compliance with the NHPA in several respects, any one of which could support a D.C. Circuit ruling setting aside the PA and other NHPA compliance actions and requiring NRC staff to re-visit its NHPA compliance on remand. In turn, any such ruling would necessarily require the Region to reassess its NHPA (and NEPA) compliance at the time of permitting, regardless of Powertech's hedged assertion that "the Region's decision to sign the [Programmatic Agreement] was reasonable *when it was made*." Powertech Response at 13 (emphasis supplied).

[2] The D.C. Circuit's rules provide for the filing of "initial" briefs in order to determine the contents of the Joint Appendix ("JA"), which constitutes the excerpt of the administrative record designated by parties. This JA is assembled and filed after all of the briefing and contains all of the record documents cited in the parties' briefs. Thus, the Initial Opening Brief, while citing to the relevant record documents, leaves the "JA" cites blank, to be filled in after all merits briefing is complete.

[3] In addition to the NHPA claims, the D.C. Circuit case also involves significant overlap regarding compliance with the National Environmental Policy Act, including the federal government's NEPA obligations to properly evaluate impacts to the significant and abundant Lakota cultural resources at the site. See e.g., Initial Opening Brief at 25-34.

State Court Proceedings Remain Stayed

Powertech also fails to demonstrate that a stay in this case will necessarily lead to any delay in the long-stayed South Dakota state permit proceedings. Indeed, Powertech readily admits that it is "seeking resumption of the state permit proceedings …" (Powertech Response at 15) and that it believes that "sufficient action on federal permits is complete to allow the state agencies to proceed…." Powertech Response at 17. Powertech's claims of prejudice hinge solely on its assertion that its efforts to restart the state permit proceedings have "no assurance of success," in large part because of objections by the hundreds of other, non-tribal, parties that have objected to the state permits. Id. at 16. Notably, however, the only evidence Powertech has provided of its efforts to resume permitting is a request for a "status conference" in the South Dakota Water Management Board that the company's Attachment G demonstrates "does NOT resume the hearing" for those permits. Id., Attachment G at 1 (emphasis in original). No evidence was presented of any efforts by Powertech to revive the Board of Minerals and Environment permitting. This Board should not rely on such speculative and tenuous allegations of prejudice.

Conclusion

It sum, Powertech is alone in seeking to move forward without resolution of the pending D.C. Circuit proceedings challenging the NRC decisions the Region relied on in its permitting actions. This Board has ample authority to grant the stay to preserve the orderly procedure set forth in the regulations for UIC permit appeals, and there is no basis to grant any of the extraordinary merits relief sought in Powertech's Response.

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STATEMENT OF COMPLIANCE WITH WORD LIMITATION

This Reply complies with the requirement at 40 C.F.R. § 124.19(f)(5) that replies to motions not exceed 7,000 words. This Reply, excluding attachments, is approximately 1,749 words in length.

LIST OF ATTACHMENTS

Petitioners' Initial Opening Brief, *Oglala Sioux Tribe, et al. v. U.S. NRC*, (D.C. Cir. Case No. 20-1489).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Reply was served by email on the following persons this 28th Day of May, 2021:

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