

**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)	
)	

SUPPLEMENTAL PETITION FOR REVIEW

Pursuant to 40 C.F.R. § 124.19(f), Petitioner Oglala Sioux Tribe (“Tribe”), through counsel, moves for leave to file this Supplemental Petition for Review. 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 issuing the UIC licenses at issue in this case.

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.

Lastly, three regulatory reports affecting and changing the scope of the proposed activities have been filed by the permit applicant with Canadian security and exchange officials. These reports are referred to as Preliminary Economic Assessments (PEA) and each one details expanded proposals for operations related to the Dewey-Burdock property and surrounding areas. Together, these reports confirm that EPA Region 8's analyses and permitting decisions do not match the applicant's current plans, mandating that EPA Region 8 update its analysis, particularly its assessment of cumulative impacts.

I. The Cultural Resources Survey Methodology Demonstrates that the Cultural Resources Information at the Dewey-Burdock Site is Not Unavailable

In September 2021, the U.S. Nuclear Regulatory Commission (NRC) Staff and the Oglala Sioux Tribe finalized a methodology for conducting a cultural resources survey at a proposed in situ leach uranium mine site. See Attachment #36, "Survey Methodology to Identify Sites of Historic, Cultural, and Religious Significance to the Oglala Sioux Tribe for the Crow Butte Resources Inc. In Situ Uranium Recovery Facility in Dawes County, Nebraska, September 2021". This survey methodology is directly relevant to the Petition for Review concerning the proposed Dewey-Burdock In Situ Leach uranium facility at issue in this case.

In its Petition for Review, the Oglala Sioux Tribe argued that EPA Region 8's reliance on the NRC Staff's National Historic Preservation Act (NHPA) compliance was unlawful, as the cultural resources information was not "unavailable" as claimed by the NRC. See Petition for Review at 20-22. The new Survey Methodology finalized in September 2021 demonstrates that the EPA Region 8 and the Tribe have the ability and the proper developed protocol roadmap to conduct the surveys necessary to conduct consultation on the inventory and evaluation of cultural resources, and regarding mitigation of the impacts to those resources – as required by the NHPA.

As such, the basis for the NRC's, and in turn EPA Region 8's, finding that the cultural resources information in "unavailable" is no longer valid.

Notably, this newly developed cultural resources survey methodology was negotiated and finalized after the final ruling from the NRC on the Dewey-Burdock matter on October 8, 2020. Thus, neither the Commission, nor the D.C. Circuit Court of Appeals, had the benefit of this jointly-developed cultural resources survey methodology. Through this filing, EPA Region 8 and this Board now have the benefit of understanding how a cultural resources survey should be undertaken at the Dewey-Burdock site in conjunction with the Oglala Sioux Tribe. This is significant new information that EPA Region 8 and this Board should consider and act upon to remand (voluntarily or otherwise) the UIC permits at issue in this case to conduct the good faith and meaningful consultation under the NHPA that has been lacking from the federal government throughout the permitting processes for the proposed mine. At minimum, this new development requires analysis by EPA Region 8 as to whether the agency has complied with the NHPA.

II. The Fall River County Ordinance Demonstrates that the Proposed Project is Unlawful Under Local Laws

In November 2022, a strong majority of the citizens of Fall River County, in which approximately half of the proposed Dewey-Burdock project is located, voted to make uranium mining a nuisance under county regulations. See Attachment #37 (Fall River County Resolution). The result of this vote is that the proposal is no longer a lawful activity. This new development raises substantial issues as to the viability, and certainly the propriety, of EPA Region 8 finalizing and issuing UIC permits for activities that are unlawful in the local jurisdiction. See 40 C.F.R. § 144.35. EPA Region 8 cannot permit activities that are illegal in the jurisdiction in which they are proposed. Id.

At minimum, this new development requires EPA Region 8 to review its permitting rationale and analysis to account for the new local laws and regulations affecting the activity it proposes to finalize a permit for. Under the federal Administrative Procedure Act (5 U.S.C. § 706), the agency’s decision is arbitrary and capricious to the extent it “failed to consider an important aspect of the problem” and “offered an explanation for its decision that runs counter to the evidence before the agency.” Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983).

III. EPA Region 8’s Analyses and Decisions do not Match the Project Design

The expanded scope of the project area, additional processing proposals, and the current site configuration have not been subjected to Region 8 review, and therefore require additional analysis before a permit can be issued, or approved by EAB. Securities filings from the permit applicant confirm three major changes that impact EPA permitting. Attachment #38 (NI 43-101 Technical Report Preliminary Economic Assessment Dewey-Burdock Uranium ISR Project South Dakota, USA) (December 2020 PEA); Attachment #39 (NI 43-101 Technical Report Preliminary Economic Assessment Gas Hills Uranium Project Fremont and Natrona Counties, Wyoming, USA) (August 2021 PEA); Attachment #40 (NI 43-101 Technical Report Mineral Resource Report Gas Hills Uranium Project Fremont and Natrona Counties, Wyoming, USA) (May 2021 PEA). The significant changes proposed through these documents demonstrate the inadequacies of the existing analysis, particularly EPA Region 8’s consideration of the cumulative impacts of the construction and operation of the drill holes authorized through the UIC permits at issue in this case. See 40 C.F.R. § 144.33(c)(3).

For instance, the December 2020 PEA recognizes that “Additional Permit/License amendments and approvals necessary to realize all resources included in this PEA [may] cost up

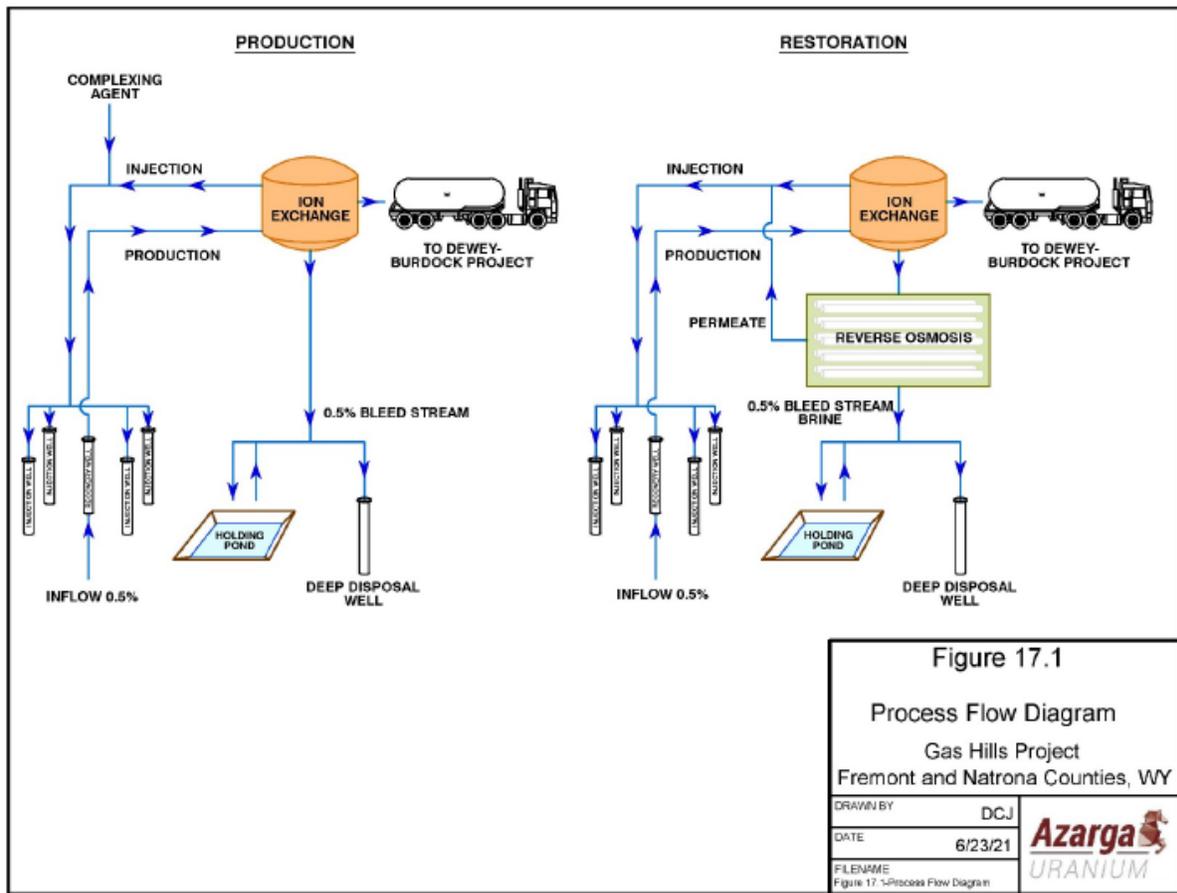
to \$500,000.” Attachment #38 at 24. Although the “project permit area” is 10,580 acres, the PEA addresses “approximately 16,962 acres of mineral rights in the project area” that are controlled by Powertech. Id. at 19. “Permit/license amendments will be required for expanded well field areas covered in this PEA” Id. at 113. The expanded well field areas, and accompanying infrastructure, involves EPA Region 8 permitting and is integral to each of the resource areas at issue in the Petition.

In 2021, the permit applicant confirmed that the volume and character of the waste streams changed. The applicant’s plans now include waste and residues from uranium processing involving wells slated to use acid leach, which will be initially processed at one or more of Powertech’s “satellite operations” and then shipped to Dewey-Burdock for the remaining three “major solution circuits.”

ISR operations consist of four major solution circuits, ion exchange to extract uranium from the mining solution, an elution circuit to remove uranium from the IX resin, a yellowcake precipitation circuit, and a dewatering, drying, and packaging circuit. Because the Project will be a satellite facility to Azarga’s Dewey-Burdock Project, only the first major solution circuit (the IX circuit) will be located at the Project. Loaded resin will be transported to the Dewey-Burdock Project, where the uranium will be eluted, precipitated, dried, and packaged.

Attachment #39 (August 2021 PEA) at 82. The regulatory filing includes a diagram of the relationship between one of the satellite facilities and the Dewey-Burdock Project:

Figure 17.1. Process Flow Diagram



Region 8’s permitting materials do not address the announced plans to use Dewey-Burdock as a central processing facility for Gas Hills and other ISL uranium projects. EPA must analyze this, and any other satellite facilities, before issuing any permits.

The approach EPA must follow pursuant to federal law is consistent with, but broader than, the recommendations in the May 2021 PEA. The Technical Report recommended additional work, including “additional groundwater modelling to further evaluate utilization of ISR across all project areas” before the project can go forward. Attachment #40 at 71. Despite the overlap between the operational and regulatory requirements, the permit file does not reflect current plans of the applicant to use the Dewey-Burdock site as a central processing and disposal

facility across an undisclosed number of project areas, many of which are likely to impact groundwater, cultural resources, and other Oglala Sioux interests.

In order to conserve agency resources, EPA Region 8 may properly withdraw the permits and take all appropriate action to address the project that Powertech plans to implement. See 40 C.F.R. § 124.19(j). Alternatively, these changes are properly added to the issues raised in the Petition for consideration by the Board.

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CERTIFICATE OF SERVICE

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

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