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

In re: Powertech (USA) Inc. Permit No. SD31231-0000 and SD52173-0000	UIC Appeal No. 20-01

EPA REGION 8 RESPONSE TO PETITIONER'S MOTION TO AMEND PETITION FOR REVIEW

EPA Region 8 (the Region) opposes Petitioner Oglala Sioux Tribe's Motion to Amend Petition for Review. The issue in this appeal is whether EPA Region 8 properly issued two Underground Injection Control (UIC) permits under the Safe Drinking Water Act. That question must be judged based on the administrative record for the permitting actions. Although Petitioner claims that "significant events have transpired which bear directly on this Board's review of the matters raised in the Petition," the three named events are not relevant to, and are outside the scope of, the UIC permitting actions at issue. Petitioner has not justified its request to expand the scope of review to include information that was created long after the Region took the challenged actions, and to reframe its arguments more than two years after filing its Petition.

Procedural Considerations

The Environmental Appeals Board (EAB or the Board) has treated the amendment and supplementation[1] of petitions as an issue of timeliness under its regulation governing the appeal of permit decisions. *See In re Sierra Pacific Industries,* 16 E.A.D. 1, 14 (EAB 2013) (treating amended petitions as late filings). "A petition for review must be filed with the Clerk of the Environmental Appeals Board within 30 days after the Regional Administrator serves notice of the issuance of a RCRA, UIC, NPDES, or PSD final permit decision under § 124.15…. A petition is filed when it is received by the Clerk of the Environmental Appeals Board…." 40 C.F.R. § 124.19(a)(3). Whether a petition is timely filed is a "threshold procedural requirement[]." *In re Sierra Pacific Industries* at 13. A petitioner seeking to file an amended or supplemental petition after the regulatory deadline must justify the late filing. *See id.* at 15 (denying motions to accept late-filed amended petitions submitted without sufficient justification).

The Region acknowledges that the Board has discretion to modify its procedural rules. 40 C.F.R. § 124.19(n). But contrary to Petitioner's statement that "the Board has regularly granted such requests where there was no discernible prejudice to the permittee," the Board permits late filings only in "special circumstances":

[1] The Petitioner's "Motion to Amend Petition for Review" actually requests that Petitioner be allowed to file a *supplemental* petition, without any amendment of the petition already on file. *See* Motion to Amend Petition for Review at 4 ("Oglala Sioux Tribe moves the Board to accept the Supplemental Petition for Review filed herewith."). Requests to amend and to supplement raise much the same issues in terms of timeliness, and hence this Response will not distinguish between amendment and supplementation except where the distinction may be relevant.

One such relevant distinction concerns a procedural requirement. The requested Supplemental Petition would in effect allow Petitioner to exceed the 14,000 word limit established by 40 C.F.R. § 124.19(d)(3). Specifically, the Petition includes a statement that it is approximately 13,813 words in length, and the proposed Supplemental Petition appears to contain approximately 1,544 words. Petitioner's Motion to Amend does not address the word count issue.

> The EAB requires strict adherence to the filing deadlines in the regulations. The filing requirements for a petition for review serve an important role as they help bring repose and certainty to the administrative process. The Board will not excuse a late-filed petition for review unless it finds special circumstances justify the untimeliness.

Guide to the U.S. Environmental Protection Agency's Environmental Appeals Board, at 17 (March 2023); *see also In re AES Puerto Rico*, 8 E.A.D. 324, 329 (EAB 1999) ("The Board will relax a filing deadline only where special circumstances exist.").

Instances in which the Board has accepted late filings demonstrate that special circumstances justifying late filing tend to involve "[d]elays stemming from extraordinary events, such as natural disasters and response to terrorist threats, or from causes not attributable to the petitioner." *In re Town of Marshfield, Massachusetts*, 07-03 (March 27, 2007), slip op at 5 (unpublished opinion). In *AES Puerto Rico*, for example, the Board treated a petition as timely when Federal Express aircraft problems resulted in a one-day filing delay. 8 E.A.D. at 329. The Board has also allowed late filings in "cases where mistakes by the permitting authority have caused the delay or when the permitting authority has provided misleading information," as when petitioners were mistakenly instructed to file appeals with EPA's Headquarters Hearing Clerk. *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 123-124 (EAB 1997).[2]

The Board has also accepted a late filing based on important policy considerations. *See In re Indeck-Elwood*, LLC, 13 E.A.D. 126, 139 fn. 36 (EAB 2006). In that case, the Board explained that the petitioner raised an issue challenging the validity of the entire permit, that the issue involved important policy considerations, that there was no discernible prejudice to the

[2] *See also In re Hillman Power Co., L.L.C.*, 10 E.A.D. 673 (EAB 2002) (permit issuer failed to serve all parties that had filed written comments on the draft permit); *In re Avon Custom Mixing Servs., Inc.*, 10 E.A.D. 700, 703 n.6 (EAB 2002) (delay in reaching the Board attributable to EPA's response to anthrax contamination concerns); *AES Puerto Rico*, 8 E.A.D. at 328 (extraordinary circumstances created by hurricane and its aftermath warranted relaxation of deadline).

permittee, and that the amended petition was filed before any responsive pleadings. *Id.* The Board emphasized that it "has entertained issues raised in a belated manner...only in particularly compelling circumstances and/or when important policy issues have been at stake." *In re Indeck-Elwood*, PSD Appeal 03-04, Order (1) Granting Motion for Leave to File Amended Petition and (2) Requesting Region V and /or OGC to File a Response at 10 (Feb. 3, 2004). The important policy consideration in that case – the agency's compliance with the Endangered Species Act – was not raised in the initial petition, but only in the motion to amend. As explained below, the posture of this case is far different, and so the Board's decision in *Indeck-Elwood* does not suggest that the Board should allow amendment of the Petition.[3]

Argument

In this case, Petitioner does not raise special circumstances or important policy considerations that would justify the amendment of its original petition. Petitioner argues that there have been "significant events" since its original filing on December 24, 2020, that "bear directly" on the Board's review of matters raised in the Petition, and that those events relate to "important policy considerations" that merit allowing amendment of the Petition. These issues and events involve: (1) the Region's National Historic Preservation Act (NHPA) compliance; (2) a local ordinance passed by Fall River County, South Dakota; and (3) three economic assessment reports published by Powertech that purportedly describe changes in the scope of the Dewey-Burdock project.

[3] Unlike the Federal Rules of Civil Procedure, the Board's procedural rules do not specifically provide for amendment of pleadings. *Compare* Fed. R. Civ. P. 15 *with* 40 C.F.R. § 124.19. Petitioner's citation of the Federal Rule 15(d) is therefore inapposite.

As explained below, the events and considerations described by Petitioner are not relevant to the Board's review of the challenged permitting actions, and therefore do not support Petitioner's request to amend.

National Historic Preservation Act

Petitioner's first argument is that "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." Motion to Amend Petition for Review at 5. In relation to this NHPA policy consideration, Petitioner argues that it is a "significant event[]" that "in the intervening almost two and half years [since the Petition was filed], 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." Motion to Amend Petition for Review at 1.

As to "whether" the Region had an obligation to comply with the NHPA, there is no issue: the Region acknowledged that the NHPA applies to its UIC permitting actions. As explained in the Region's Response to Comments on the draft permits, the Region complied with the NHPA by relying on the compliance process adopted by the Nuclear Regulatory Commission (NRC). *See* Attachment 1, Response to Comments #263, at 309-312; Status Report and Motion for Stay of Proceedings at 3. This reliance is authorized under an applicable regulation allowing the designation of a lead federal agency for NHPA section 106 compliance when more than one agency is involved in an undertaking. *See* 36 C.F.R. § 800.2(a)(2).[4]

[4] "*Lead Federal agency*. If more than one Federal agency is involved in an undertaking, some or all the agencies may designate a lead Federal agency, which shall identify the appropriate official to serve as the agency official who shall act on their behalf, fulfilling their collective responsibilities under section 106. Those Federal agencies that do not designate a lead Federal agency remain individually responsible for their compliance with this part."

Petitioner's further contention that there is now an issue concerning "to what extent" the Region was obligated to comply with the NHPA does not raise any new question. In its first filing in this matter, Petitioner made essentially the same argument concerning NHPA compliance that it now asserts is an issue requiring a supplemental Petition. Specifically, as stated in the original Petition, "[t]he administrative record, including EPA's decision documents and EPA's Response to Comments (attached for reference at Attachment 35), demonstrate that EPA has failed to comply with the consultation and historic resources protection requirements of the NHPA." Petition at 16. Therefore, this matter is different from *Indeck-Elwood*, in which the Board allowed amendment of a petition on the ground of an "important policy consideration" to add a statutory compliance argument *not* made in the original Petition. *See In re Indeck-Elwood*, PSD Appeal 03-04, Petition for Review (Nov. 14, 2003); Order (1) Granting Motion for Leave to File Amended Petition and (2) Requesting Region V and/or OGC to File a Response (Feb. 3, 2004). Here, the important policy consideration of compliance with the NHPA has already been raised, and therefore there are no policy concerns supporting amendment or supplementation of the petition in order to allow its consideration.

The Petitioner does not identify any special circumstance or post-filing development that would justify allowing it to amend its Petition to revise its initial arguments concerning the NHPA. The only apparent support for its request is the assertion that the NRC's development of a cultural resources survey protocol, in conjunction with the Tribe, "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." Motion to Amend at 1. This assertion mischaracterizes the basis for the Region's decision concerning NHPA compliance, which does

not rely on a conclusion that cultural resource information was or would be unavailable. *See* Attachment 1, Response to Comments #263, at 309-312. Because the assertion is incorrect and unsupported, it cannot serve as a relevant circumstance supporting the request to amend. And even if the Region had reached the conclusion that Petitioner attributes to it, the Petitioner does not explain how, or even argue that, a finding about the availability of information would make the lead agency mechanism provided by 36 C.F.R. § 800.2(a)(2) unavailable.[5]

Thus, Petitioner had the chance to review the Region's explanation of its NHPA compliance, and to challenge that compliance in the original Petition. Petitioner cites no relevant events since then that would justify its present request to belatedly revise its argument concerning the Region's NHPA compliance. Through joint status reports provided to the Board while this case has been held in abeyance, the Board already has been advised of the only development of note related to EPA's NHPA compliance, which is that the U.S. Court of Appeals for the D.C. Circuit upheld the NRC's NHPA compliance efforts. *See Oglala Sioux Tribe, et al. v. U.S. Nuclear Regulatory Comm'n*, 45 F.4th 291, 306 (D.C. Cir. 2022) ("The Commission reasonably satisfied its obligations under the NHPA's regulatory scheme."). Petitioner does not refer to this decision in its Motion to Amend. Instead, Petitioner attributes to the Region an argument it never made, in an apparent effort to relitigate an issue already settled by the D.C. Circuit in litigation to which Petitioner was a party. But as the federal courts have established, the NRC has complied with the NHPA in connection with the Dewey-Burdock project, and therefore EPA Region 8 has complied with the NHPA in connection with the UIC

[5] Nor does the Petitioner explain how the process by which "[the NRC] and its professional staff have jointly developed and endorsed, in conjunction with the Oglala Sioux Tribe, a cultural resources survey protocol," demonstrates that the Region acted unreasonably in relying on the NRC's NHPA compliance efforts. If this process "demonstrates that the information related to cultural resources is not 'unavailable'" to the NRC, then that reflects a successful implementation of the lead agency relationship envisioned at 36 C.F.R. 800.2(a)(2) and described in the Region's Response to Comments.

permits at issue here. The Board should not allow Petitioner to reopen that question in this forum,[6] or to belatedly supplement its Petition in an attempt to buttress its arguments on a question that Petitioner was aware of from the beginning.

Accordingly, as to the NHPA, Petitioner has presented no special circumstances that would justify its untimely Petition amendment. Further, as explained above, Petitioner has not presented any new or changed important policy considerations that would justify the Board granting the Motion to Amend.

Effect of Local Laws

Petitioner next claims that the Board should review, as an important policy consideration, whether the Region may issue a final permit for an activity that is unlawful under local laws. The Board has already ruled on this issue in several cases and determined that EPA cannot deny or condition a permit based on state or local law requirements, as they are beyond the scope of the federal UIC program. *See In re Archer Daniels Midland Company,* 17 E.A.D. 380, 403 ("It is well-settled that property rights are governed by legal precepts that are outside the scope of UIC permitting authority."); *In re Environmental Disposal Systems, Inc.,* 12 E.A.D. 254, 267 (EAB 2005) ("Accordingly, to the extent that SPMT's position on appeal can be construed as a land use or property rights kind of challenge, the Board lacks jurisdiction to adjudicate it." citing *In re Suckla Farms, Inc.,* 4 E.A.D. 686, 695 (EAB 1993) ("EPA is simply not the correct forum for litigating contract or property law disputes that may happen to arise in the context of waste disposal activity for which a federal permit is required. These disputes properly belong in a court of competent jurisdiction.")); *In re Envotech LP*, 6 E.A.D. 260, 272 (EAB 1996) ("More

[6] *See In Re: Indeck-Elwood*, 13 E.A.D. at 211 (Board denied request to amend petition to argue that FWS failed to comply with the Endangered Species Act. "Plainly, challenges to the actions of the FWS belong in a different forum; the Board does not have jurisdiction to review the Service's decisions. Such concerns should have been pursued as a separate Administrative Procedure Act … challenge to the FWS's decisionmaking.")

fundamental issues, such as siting of the wells, are a matter of state or local jurisdiction rather than a legitimate inquiry for EPA."); *In re Beckman Production Services*, 5 E.A.D. 10, 23 (EAB 1994) ("Although Beckman may have satisfied the requirements for issuance of a UIC permit, Beckman remains subject to applicable state and local laws, including any judicial order entered in connection with the pending litigation that may affect Beckman's use of the Pohl 1-34A site…. Because the pending litigation does not alter or affect the criteria applied by the Region in evaluating Beckman's permit application, the Region did not err in issuing the permit prior to resolution of the litigation."). Therefore, EPA's compliance with local law is not a special circumstance or an important policy consideration for the Board's review. Rather, as established by Board precedent, such compliance is outside the scope of the federal UIC program, and therefore outside the Board's jurisdiction.

Financial Documents Filed with the Canadian Government

Finally, Petitioner points to three Preliminary Economic Assessment (PEA) documents that Powertech allegedly filed with Canadian security and exchange officials, and claims that because these documents evidence Powertech's potential intent to change the scope of the project, these documents should be considered in EPA's review of the challenged permit applications. However, Powertech filed the PEA documents with the Canadian government *after* EPA issued the UIC permits. In addition, Powertech has never submitted any of the PEA documents to EPA as part of any UIC permit application. Accordingly, these PEA documents are outside the scope of the permitting actions before the Board. *See* 40 C.F.R. § 124.18(c) ("The record shall be complete on the date the final permit is issued."); *In re Town of Newmarket, New Hampshire,* 16 E.A.D. 182, 241-242 (EAB 2013) ("The part 124 regulations governing this

permit proceeding specify the documents that must be included in the administrative record and expressly provide that the 'record shall be complete on the date the final permit is issued.'").

The Class III and V permits issued by Region 8 are based on the project as described in the permit application and are summarized in detail in the accompanying fact sheets. If Powertech chooses to modify its project in the future beyond the scope of the issued permits, it will have to seek permit modifications in accordance with the UIC regulations at 40 C.F.R. § 144.39 and will have to submit appropriate information and documentation to Region 8 for review at that time. If EPA grants such permit modifications, that would be a separate permitting action subject to a separate challenge and EAB review. Such potential future modifications are not relevant to the permits at issue in this case, and thus the PEA documents are outside the scope of the issued Class III and V permits before the Board. Further, this Petition should be denied because the Petitioner does not raise any special circumstances or important policy considerations in support of its argument to justify the Board granting it.

Conclusion

The Petitioner has not presented any special circumstances, important policy considerations, or other relevant information sufficient to justify allowing it to amend or supplement its original petition. The three events identified, which occurred long after Region 8 issued its final permits, are not relevant to, and are outside of the scope of, the UIC permitting actions before the Board. Accordingly, for the reasons set forth herein, Region 8 respectfully requests that the Board deny Petitioner's Motion to Amend Petition for Review.

Statement of Compliance with Word Limitations

In accordance with 40 C.F.R. § 124.19(f)(5), the undersigned attorneys certify that this Response to Petitioner's Motion to Amend Petition for Review does not exceed 7000 words.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing EPA REGION 8 RESPONSE TO PETITIONER'S MOTION TO AMEND PETITION FOR REVIEW in the matter of Powertech (USA) Inc., Appeal No. UIC 20-01, was filed electronically with the Environmental Appeals Board's E-filing System and served by email on the following persons on May 8, 2023.

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