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

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

REPLY OF POWERTECH (USA) INC.
IN SUPPORT OF MOTION TO STRIKE AND
ALTERNATIVE MOTION FOR LEAVE TO FILE SURREPLY

On February 22, 2024, Powertech (USA) Inc. ("Powertech") joined the EPA Region 8 Motion to Strike and Alternative Motion for Leave to File Surreply. Powertech files this reply in support of that motion and requests that the Board strike the new arguments raised in the Reply by Petitioner. In its response to that motion, Petitioner either abandoned the new arguments or conceded that the new arguments essentially lack merit.

In its response to the motion, the Petitioner essentially retracts its argument that "the SDWA places the burden on the applicant to make a site-specific showing of the 'strict controls' required to gain an injection permit, even when the Region has granted an aquifer exemption". Reply to Region 8 and Powertech Responses to Petition for Review 16 (January 22, 2024).

Instead, Petitioner withdraws to its argument that EPA must assure containment of injected fluids within the meaning of 40 CFR 144.12 before issuing a permit rather than rely on compliance with the permit to assure containment and prevent endangerment of underground sources of drinking water. The Petitioner had asserted that "the SDWA places the burden on the

applicant" to show "strict controls" rather than on EPA to establish controls in the permit. Thus, the Reply made a new argument rather than recognizing, as explained in the cited case of *W. Neb. Res. Council v. Envtl. Prot. Agency*, 793 F.2d 194, 196 (8th Cir. 1986), that strict controls are imposed by the permit, "which will include a continuing prohibition on the movement of any contaminated fluids into nonexempt underground sources of drinking water". *Id*.

Next, the Petitioner retreats from its claim that EPA Region 8 failed to review "available" information or to provide that information to the public for comment and explains that it just meant "obtainable" information that EPA failed to require Powertech to collect and submit. Now the Petitioner says "obtainable (e.g. "available") data was excluded from the application and in granting permits without this data – only to require that it be submitted and analyzed at a future date" EPA failed to do its duty. Thus, the argument about failing to deal with "available" data goes away.

The Petitioner seeks to cloak its efforts to resurrect the National Historic Preservation Act ("NHPA") claims that the DC Circuit and the Board has decided against it by asserting again that section 110 of the NHPA imposes additional obligations without specifying any new procedural requirements for the protection of historic and cultural resources that are asserted to be created by Section 110. Reply at 7. Accordingly, Petitioner fails to "identify any specific responsibility that was allegedly dispensed with" as EPA noted in the Motion to Strike. Motion at 8.

In arguing that it has not raised a new argument under the NHPA, Petitioner effectively concedes that its NHPA Section 110 argument is the same as its NHPA section 106 argument that EPA failed to ""ensure[] proper identification and evaluation of cultural resources", as set forth in the Petition "paragraphs immediately following the Petitioner's assertion of violations of

Section 110". Response to Motion to Strike at 4. Those paragraphs spell out Petitioner's NHPA section 106 argument, and the Board has already ruled that argument decided by the DC Circuit.

> [T]he D.C. Circuit rejected the Tribe's argument that the NRC had "impermissibly postponed identifying historic properties until after Powertech had begun operations," finding that the NHPA regulations "expressly contemplate this approach" and allow for a phased identification and evaluation of historic properties through a programmatic agreement "'[w]hen effects on historic properties cannot be fully determined prior to approval of an undertaking.'" Id. (quoting 36 C.F.R. § 800.14(b)(1)(ii)).
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> With the D.C. Circuit conclusively determining NRC's compliance with NHPA section 106 and the NRC serving as the lead federal agency for the Dewey-Burdock project under 36 C.F.R. § 800.2(a)(2), it necessarily follows that the Region too has satisfied its obligations under NHPA section 106.

Order Denying Motion to Amend Petition for Review, Denying Review on the Petition's National Historic Preservation Act Section 106 Issue, and Identifying Issues in the Petition Remaining for Resolution at 24 (November 16, 2023). Therefore, the new argument that the Reply seeks to make has no substance.

Finally, the Petitioner essentially abandons its argument that "EPA is subject to NEPA compliance unless statutorily exempted" by pretending that it did not make that argument, asserting instead that it only ever argued that "EPA is subject to NEPA's statutory commandments". Thus, the Petitioner drops the argument that there must be a statutory exemption to avoid NEPA compliance.

For the foregoing reasons, Powertech asks that the Board strike the new arguments in the Reply that:

1. The SDWA places the burden on the applicant to make a site-specific showing of "strict controls" (Reply 16);
2. EPA Region 8 failed to review "available" information or to provide that information to the public for comment (Reply 10-11);

3. Section 110 of the NHPA created new procedural requirements for the protection of historic and cultural resources (Reply 7); and
4. EPA is subject to NEPA compliance unless statutorily exempted (Reply 12).

Statement of Compliance With Word Limitations

In accordance with 40 C.F.R. § 124.19(f)(5), the undersigned attorneys certify that this reply contains fewer than 7000 words.

Respectfully submitted,

Robert F. Van Voorhees
/s/ Robert F. Van Voorhees

Robert F Van Voorhees PLLC
1155 F Street, NW, Suite 700
Washington, DC 20004-1357
Telephone: 202-365-3277
E-mail: bob.vanvoorhees@gmail.com

Jason A. Hill
Holland and Knight LLP
811 Main Street, Suite 2500
Houston, Texas 77002
Telephone: (713) 224-8224
E-mail: Jason.hill@hklaw.com

Attorneys for Powertech (USA) Inc.

Dated: February 22, 2024

CERTIFICATE OF SERVICE

I hereby certify that, on February 22, 2024, I served the foregoing document on the following persons by e-mail in accordance with the Environmental Appeals Board's September 21, 2020 Revised Order Authorizing Electronic Service of Documents in Permit and Enforcement Appeals:

Attorneys for Petitioner Oglala Sioux Tribe

Jeffrey C. Parsons, Senior Attorney
Roger Flynn, Managing Attorney
Western Mining Action Project
P.O. Box 349
Lyons, CO 80540
(303) 823-5738
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

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

Attorneys for EPA
Lucita Chin
Senior Assistant Regional Counsel
Environmental Protection Agency 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

Erin Perkins
Office of Regional Counsel
EPA Region 8
1595 Wynkoop St.
Mail Code: 8ORC-LC-M Denver, CO 80202
(303) 312-6922
perkins.erin@epa.gov

/s/ Robert F. Van Voorhees
Robert F Van Voorhees PLLC
1155 F Street, N.W.
Suite 700
Washington, DC 20004-1357
E-mail: bob.vanvoorhees@gmail.com
Counsel for Powertech (USA) Inc.