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WATER RIGHTS PROGRAM

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
) SS.
 COUNTY OF HUGHES) SIXTH JUDICIAL CIRCUIT

IN THE MATTER OF WATER PERMIT)
 APPLICATIONS 2685-2 And 2686-25,) 32CIV22-
 POWERTECH (USA), INC.)

CERTIFICATE OF SERVICE

IN THE MATTER OF THE 2012)
 GROUNDWATER DISCHARGE PLAN)
 APPLICATION SUBMITTED BY)
 POWERTECH (USA), INC.)

I hereby certify on February 7, 2022, originals of the following documents were served through South Dakota's Odyssey File and Serve Portal and a true and correct copy of the following documents:

ORDER FOR TRANSCRIPT, STATEMENT OF ISSUES, AND NOTICE OF APPEAL

were served upon the following individuals by U.S. Mail, postage prepaid:

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Ron Duvall Water Rights Administrator, SD DANR 523 E. Capitol Ave. Pierre, SD 57501	

By: Richard M. Williams
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WATER RIGHTS
PROGRAM

STATE OF SOUTH DAKOTA)
) SS.
COUNTY OF HUGHES)

IN CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

32CIV22-

IN THE MATTER OF WATER)
PERMIT APPLICATIONS 2685-2)
And 2686-2, POWERTECH (USA) INC.)

NOTICE OF APPEAL

IN THE MATTER OF THE 2012)
GROUNDWATER DISCHARGE PLAN)
APPLICATION SUBMITTED BY)
POWERTECH (USA) INC.)

TO: All Parties of Record; Hunter Roberts, Department Secretary, SD DANR; Ron Duvall, Water Rights Administrator, SD DANR, Water Rights Program; Tim Bjork, Chairman, South Dakota Water Management Board.

Please take notice that pursuant to SDCL Ch. 1-26, Powertech (USA) Inc., appeals to the Circuit Court for judicial review in the above-captioned proceeding of the *Order Denying Powertech [sic] Motion to Amend Procedural Order, Denying Clean Water Alliance's Motion to Allow Electronic Service, and Updating Parties of Record*, dated December 8, 2021. Notice of Entry of said order was dated January 7, 2022.

Dated: February 7, 2022.

GUNDERSON, PALMER, NELSON
& ASHMORE, LLP

By: /s/ Richard M. Williams

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**DEPARTMENT of AGRICULTURE
and NATURAL RESOURCES**

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523 E. CAPITOL AVE
PIERRE SD 57501-3182
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January 7, 2022

NOTICE OF ENTRY OF ORDER

TO: Powertech (USA) Inc.
c/o Matthew E. Naasz and Richard M. Williams, Counsel
Gunderson, Palmer, Nelson & Ashmore, LLP
P.O. Box 8045
Rapid City SD 57709

And Parties of Record Mailing List (see attached list dated January 7, 2022)

FROM: Ron Duvall, Water Rights Permitting Administrator
SD DANR, Water Rights Program

SUBJECT: Adoption of Order regarding denying Powertech motion to amend procedural order, denying Clean Water Alliance's motion to allow electronic service, and updating parties of record concerning the contested case hearing for the Consolidated Case in the matter of Water Permit Application Nos. 2685-2 and 2686-2 and Ground Water Discharge Plan GWD 1-13, Powertech (USA) Inc.

At the Water Management Board meeting on December 8, 2021, the Board adopted the Order denying the Powertech motion to amend the procedural order, denying Clean Water Alliance's motion to allow electronic service, and updating the parties of record. Enclosed is a copy of the Order signed by Tim Bjork, Chair of the Water Management Board, dated December 8, 2021.

Notices, orders, and other pleadings filed in this matter are posted on DANR's contested case page available at <https://danr.sd.gov/public/contestedcases.aspx>.

Questions may be directed to Ron Duvall, Water Rights Program at (605) 773-3352 or ron.duvall@state.sd.us.

c: Ann Mines Bailey, Assistant Attorney General
Steven R. Blair, Assistant Attorney General
David McVey, Assistant Attorney General

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DEC 27 2021

WATER RIGHTS
PROGRAM

STATE OF SOUTH DAKOTA
DEPARTMENT OF AGRICULTURE AND NATURAL RESOURCES
WATER MANAGEMENT BOARD

IN THE MATTER OF WATER PERMIT)	
APPLICATIONS NOS. 2685-2 AND 2686-2,)	ORDER DENYING POWERTECH
POWERTECH (USA), INC.)	MOTION TO AMEND PROCEDURAL
)	ORDER, DENYING CLEAN WATER
IN THE MATTER OF THE 2012)	ALLIANCE'S MOTION TO ALLOW
GROUNDWATER DISCHARGE PLAN)	ELECTRONIC SERVICE, AND
APPLICATION SUBMITTED BY)	UPDATING PARTIES OF RECORD
POWERTECH (USA), INC.)	

PROCEDURAL HISTORY

Powertech submitted applications for two water permits on June 12, 2012. Upon review, approval of the permits was recommended by the Chief Engineer. These applications were publicly noticed and petitions to intervene in the matter were received.

Previously, on March 9, 2012, Powertech submitted an application for a groundwater discharge plan. Upon review, a recommendation of approval was issued, and the matter was publicly noticed. Several hundred petitions requesting a contested case proceeding were subsequently received.

Under the statutes and rules regulating a groundwater discharge plan, the Water Management Board provides the initial approval of the plan by issuing any necessary water quality variance permits and groundwater discharge facility construction permits. See ARSD §§ 74:54:02:09, 74:54:02:11, and 74:54:02:13. The Secretary of the Department, however, issues the final approval of a groundwater discharge plan. See SDCL § 34A-2-36.1 and ARSD § 74:54:02:14. Accordingly, the Secretary appointed the Water Management Board to conduct the contested case proceedings "required by SDCL 34A-2-36.1 and ARSD 74:54:02:14 along with the inter-related permits issued by the WMB under ARSD 74:54:02:09, 74:54:02:11 and 74:54:02:13, and to issue a recommendation to the Secretary[.]" See Appointment of Water Management Board to Conduct Evidentiary Hearing, dated January 29, 2013.

On January 30, 2013, counsel for the Water Rights Program and the Groundwater Quality Program moved to consolidate the matters for further proceedings.

On February 13, 2013, the Prehearing Chair, Ev Hoyt, issued a Procedural Order. That

Order granted the Motion to Consolidate and further provided an outline for the course of these proceedings. In particular, it required intervenors or petitioners to complete an election of participation form. Class A, or Option A, participants were those who intended to fully participate in the proceedings. Class B, or Option B, participants were those who intended only to submit sworn testimony at the beginning of the contested case proceedings. Class C, or Option C, participants included those who wished to rely upon the petitions initially submitted. The Procedural Order indicates that “[a]ny party may change participation status by timely notifying DENR staff . . . and serve copies of the notification upon the parties. The Procedural Order also provided for a limited period of discovery which commenced April 1, 2013, and was required to be completed by August 23, 2013, 45 days prior to the commencement of the contested case proceedings. The parties were also required to provide disclosures of expert witnesses, witnesses, and exhibits prior to the commencement of the contested case proceedings.

Hearing was scheduled to commence on October 7, 2013 and continue through November 1, 2013. Due to the Atlas snowstorm, the hearing was postponed until October 28 through November 1, 2013. The proceedings began with the testimony of the Class B participants. See October 28-November 1, 2013 WMB Minutes. By the conclusion of the proceedings for that week, the Board had heard opening statements and had begun to receive testimony from the Class A participants, namely the testimony of John Mays, who was Vice President of Engineering of Powertech. Before the conclusion of the hearing, the parties were requested to brief several jurisdictional questions. See *id.*

The hearing was scheduled to continue on December 9 through 13, 2013. Briefs regarding the questions presented by the Board were submitted on November 14 and 19-20, 2013. On November 19, 2013, Powertech also filed a Motion to Continue. The Motion to Continue was granted on November 25, 2013.

The NRC has issued its permits, and those permits are under appeal before the Court of Appeals of the District of Columbia. That matter has been fully briefed and is set for oral argument before the Court of Appeals on November 9, 2021. There is no date-certain for when the Court of Appeals will hand down a decision. The Materials License was initially issued by the NRC in 2014. It went through an appeals process and was eventually remanded to the NRC for further proceedings. That subsequent license is now on appeal. The EPA granted an Aquifer Exemption in November 2020. The Aquifer Exemption is on appeal to the Circuit Court of Appeals for the Eighth Circuit, and the Eighth Circuit is holding that case in abeyance until the Class III and Class V well permits have been resolved. The EPA has issued those permits, but

the EPA provides for different levels of review within the agency and one of those levels of review is with the Environmental Appeals Board (EAB). The EAB now has those permits and is holding off on making a decision until the Court of Appeals with the District of Columbia has ruled on the NRC licensing because there are similar issues. Regarding the Plan of Operations approval, the BLM took comments in August 2020, and there is no indication as to where that is in the process.

Powertech's Motion to Amend the Procedural Order

On May 28, 2021, Powertech filed a Motion to Amend the Procedural Order along with a Brief in Support of the Motion and a proposed amended Procedural Order. On June 17, 2021, the Water Rights Program and the Surface Water Quality Program filed a Response in Opposition to Powertech's Motion. On October 6, 2021, the Board met at their regularly scheduled meeting and considered Powertech's motion as part of its regular agenda.

Appearances were made by: Matt Naasz and Richard Williams on behalf of Powertech; Ann Mines Bailey on behalf of DANR Water Rights and Surface Water Quality programs, Bruce Ellison on behalf of the Clean Water Alliance, Steven Gunn for the Ogalala Sioux Tribe, and Tom Ballanco for the Institute for Range and the American Mustang and Susan Watt.

Discussion

The Order Granting Powertech's Motion to Continue provides that these hearings are continued until "resolution by the federal agencies of Powertech's pending applications for the Dewey-Burdock Project set forth in this Order." To conduct this project, Powertech is required to obtain a materials license from the Nuclear Regulatory Commission. Powertech submitted its application to the NRC on August 10, 2009. According to the NRC Application Review Schedule, licensing action was completed on April 8, 2014. *See* Application Review Schedule for Dewey Burdock at <https://www.nrc.gov/info-finder/materials/uranium/licensed-facilities/dewey-burdock/dewey-burdock-schedule.html>. The matter was then brought before the Atomic Safety Licensing Board (ASLB). Review was then sought in the United States Court of Appeals for the District of Columbia Circuit. In 2018, the Court of Appeals remanded the matter to the NRC for further proceedings. *Oglala Sioux Tribe v. U.S. Nuclear Regulatory Commission, et al.*, 896 F.3d 520 (D.C. Cir. 2018). After subsequent agency proceedings, the matter is currently before the Court of Appeals once again. *See Oglala Sioux Tribe, et al. v. U.S. Nuclear Regulatory Commission, et al.*, No. 20-1489, D.C. Cir.

Powertech is also required to obtain from the Environmental Protection Agency permits for the Class III and Class V wells to be used in the project. The permits were issued by the

EPA on November 24, 2020, with an effective date of December 24, 2020. *See* <https://www.epa.gov/uic/epa-dewey-burdock-class-iii-and-class-v-injection-well-final-area-permits>. However, the matter was appealed to the Environmental Appeals Board (EAB).

Powertech must also obtain an aquifer exemption from the EPA. The aquifer exemption was requested in January of 2013 and EPA issued the grant of the exemption on November 24, 2020. It is currently being appealed before the United States Court of Appeals for the Eighth Circuit. *See Oglala Sioux Tribe v. U.S. Environmental Protection Agency*, No. 21-1167.

Finally, a portion of the project involves federal lands. Accordingly, Powertech must obtain the approval of the Plan of Operations by the Bureau of Land Management (BLM). BLM accepted public comments on the Plan of Operations in August of 2020.

Following argument, a motion was made by the Board to deny the motion to reopen the hearing and to wait, as the original order stated, until the federal issues are resolved. Discussion was held and it was asserted that it does not make sense for this Board to incur significant expense and move forward when the federal appeals court and the other agencies involved could render the Board's decision moot.

Having reviewed the briefs submitted by the Parties, heard the arguments of the Parties, and considered the foregoing the Board finds as follows:

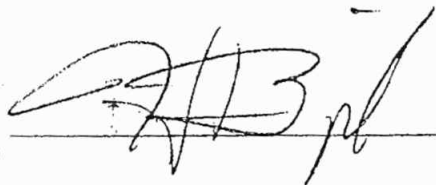
1. Powertech's Motion to Amend the Procedural Order is **Denied**.
2. Powertech may request a status conference with the Board on or after April 6, 2022 and every six (6) months thereafter.
3. The Clean Water Alliance's Motion to Allow Electronic Service is **Denied**.
4. Based on the August 18, 2021 order by Prehearing Officer Freeman to parties to update contact information, U.S. Postal Service address corrections, and contact with parties of record, the following actions are ordered:
 - a. The following parties with undeliverable mail service are removed from future mailings until such time as corrected mailing addresses are received from the party: Gary Heckenlaible, Rebecca Michele Lord, Rick V Summerville, Brianna Badure, Jerri and Ronald Baker, Joe Bassingham, Eddie Berford, Jerry Bloomer, Hannah Bochert, Ray Boots, Karl W Bothul, Rick Britton, Michelle Brock, Allen Chesson, Charles Cox, Georgiana Cross, Teresa Daiss, Kendra Dexter, Ross Dexter, Leora Drapper (Doppen), Rosie Elmore, Tom Emanuel (Executive Director - SD Peace & Justice Center), Elaine Everhart, Jeannie Fine, Jana Firkins, Lisa Freshour, Judy Gaalough, Judy Gaalswyk, Amber Gill, May Gozelet,

Joel Hawkins, Moses-Ciser & Veronica Hernandez, Patricia Hernandez, B J Hunter, Anglea and Mike Jarding, Cheryl Jarding, John B Jarding, Dan Jensen, Maxine Jensen, Corey Kennedy, Shawntera Kennedy, Jewell Keown, Stanley T Keys, Matt Lanz, Calvin Larive, Pam Ludweg, Susan Malewke, Lisa Masterson, Jim McKean, Billy Jack McLaughlin, Neal Miller, Glenn Mushaney, Jason Nachtigall, Richard Nowlan, Madeline Ortego, Otis Osborn, ~~Mary Helen Pederson~~, Chris Pierce, Linda Pirales, Gary Putnam, Jim Red Cloud, Resident (12560 Beaver Creek Rd, Hot Springs SD), Grant Rush, Mary and Jason Salway, Gary Schweigert, Peggy Semler, Robert V Shannon, Russ Sisk, J Smith, Maura Smith, Dale Steineke, Darla Stevens, Richard Stone, Michelle Sugeg, Dennis Sutherland, Alison Swan, Niklaus Towne, Loraine Tucker, Lennie Walleen, Barbara Walter, Betty Welch, Kristen Wilder, Alica, Beth Audette, Sister Gabriella Crowley, Joe Drapper (Doppen), Margaret Ikonen, Judith A Joba, Regina A Koch, Bonnie & Donald Maritz, Jody McKean, Carol Merwin, Virginia Panarella, Carrie Regelin, J & M Shaw, Dewane Stearns, Larry Tegantvoort, Milli Vong, Trip Williams, Karen Yekel;

- b. The following parties' addresses and contact person for entities shall be updated either due to mailing address corrections received from the U.S. Postal Service or responses to the August 18, 2021 order of Prehearing Officer Freeman or by request from a party: Angelia Baldwin, Rebecca R Leas, Susan Watt (BH Wild Horse Sanctuary), Mike Baldwin (Custer Conservation District), Hilary Morey (SD Dept. of Game, Fish and Parks), Barbara Cromwell, Robert Nelson (City of Hot Springs replacing former Mayor Don DeVries), Keith Alarie, Mary R Burrows, Garnder Gray, Diane Gross, Marsha Miller, Valerie A Parker - MD, Charleton T Reynar, Frank Ruther, John and Connie Aann Schwarzenbach, Linda M Styger, Judith R Van Cleave, Rick Draeger, Jim Johnson, Antoinette Reynar, Frank James (Director of Dakota Rural Action replacing Jillian Anawaty), Mark & Jennifer Belitz, Julie & Emily Christensen, Shirley and Robert Lautenschlager, Miriam and Ken Martin, Chief - Water Rights Branch of NPS Water Resources Div (replaces William R Hansen former division chief), Mary Helen Pederson;
- c. Based on requests from spouses, received either via email or phone, to remove their deceased spouses as parties of record or post office notification, the following persons are removed as parties of record: Jon Fair, Laurence Lamont,

- Alan Walker, George Corrigan, William Cing, Margaret Mary Keogh;
- d. Based on contact received via letter, phone, or email from the following persons requesting to have themselves removed as parties of record, the following persons are removed as parties of record: Jerry Simunter (correct spelling Simunek), Gwen E Kaneshiro, Marion Muhm;
 - e. Letter received from Cathy Sotherland requesting to replace Dennis or Jennie Sutherland with Cathy Sotherland. Request **Denied**.

Dated this December 8, 2021.

A handwritten signature in black ink, appearing to read 'T. Bjork', is written over a horizontal line.

Tim Bjork, Chairman

South Dakota Water Management Board

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FEB 09 2022

WATER RIGHTS PROGRAM

STATE OF SOUTH DAKOTA)
) SS.
COUNTY OF HUGHES)

IN CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

IN THE MATTER OF WATER PERMIT)
APPLICATIONS 2685-2 And 2686-25,)
POWERTECH (USA) INC.)
)
IN THE MATTER OF THE 2012)
GROUNDWATER DISCHARGE PLAN)
APPLICATION SUBMITTED BY)
POWERTECH (USA) INC.)

32CIV22-

ORDER FOR TRANSCRIPT

TO: Carla Bachand
Capital Reporting Services
1805 Sunruse Drive
Pierre, SD 57501

Pursuant to SDCL 1-26-32.2, Powertech (USA) Inc., hereby orders a transcript of the proceedings in the above-entitled action as indicated below:

Date of Proceeding	Type of Proceeding	Name of Reporter
<u>October 6, 2021</u>	<u>Administrative Motion Hearing</u>	<u>Carla Bachand</u>

Powertech (USA) Inc. is requesting only the portions of the hearing related to Powertech’s Motion to Amend Scheduling Order.

As the ordering party, I hereby certify that notice of appeal was filed with the Clerk of the Circuit Court on February 7, 2022 and that this order is **timely** made within ten days of said filing date.

I also certify that pursuant to SDCL 1-26-32.2, an original of this order has been transmitted to the Court Reporter who took the requested proceedings; that a copy has been filed with the Clerk of the Circuit Court; and that service has been made upon all parties as reflected in the **attached certificate of service**.

Dated: February 7, 2022.

GUNDERSON, PALMER, NELSON
& ASHMORE, LLP

By: /s/ Richard M. Williams

Richard M. Williams
Attorneys for,
506 Sixth Street
P.O. Box 8045
Rapid City, SD 57709
Telephone: (605) 342-1078
Telefax: (605) 342-9503
E-mail: rwilliams@gpna.com

COURT REPORTER'S ENDORSEMENT

I, _____, hereby acknowledge receipt of this order for transcript on
_____. My anticipated date of completion is _____.

Court Reporter

By: /s/ Richard M. Williams
Richard M. Williams

RECEIVED

FEB 09 2022

WATER RIGHTS PROGRAM

STATE OF SOUTH DAKOTA)
) SS.
COUNTY OF HUGHES)

IN CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

IN THE MATTER OF WATER PERMIT)
APPLICATIONS 2685-2 And 2686-25,)
POWERTECH (USA), INC.)

32CIV22-

IN THE MATTER OF THE 2012)
GROUNDWATER DISCHARGE PLAN)
APPLICATION SUBMITTED BY)
POWERTECH (USA), INC.)

ORDER WAIVING CASE FILING
STATEMENTS FOR INDIVIDUAL
INTERVENORS

Bobbi J. Rank, Presiding Judge of the Sixth Judicial Circuit, having considered Powertech's request to waive the procedural requirement of a Case Filing Statement for each party of record, finds, for good cause shown, that in the interest of judicial economy and efficiency of the Court that individual Case Filing Statements should not be required for the approximately 300 intervening parties. It is therefore, hereby

ORDERED that the requirement of individual Case Filing Statements for intervening parties is waived by the Presiding Judge pursuant to SDCL 15-6-5(h); it is further,

ORDERED that the intervening parties will be served outside of Odyssey File & Serve in a manner consistent with the South Dakota Rules of Civil Procedure and the South Dakota Administrative Procedure and Rules.

Dated this 3rd day of February, 2022.

BY THE COURT:



Bobbi J. Rank
Presiding Judge, Sixth Judicial Circuit

RECEIVED

FEB 09 2022

WATER RIGHTS
PROGRAM

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
) SS.
COUNTY OF HUGHES) SIXTH JUDICIAL CIRCUIT

IN THE MATTER OF WATER PERMIT) 32CIV22-
APPLICATIONS 2685-2 And 2686-25,)
POWERTECH (USA) INC.)
) STATEMENT OF ISSUES
IN THE MATTER OF THE 2012)
GROUNDWATER DISCHARGE PLAN)
APPLICATION SUBMITTED BY)
POWERTECH (USA) INC.)

COMES NOW Powertech (USA) Inc. ("Powertech"), by and through Matthew E. Naasz, and Richard M. Williams of Gunderson, Palmer, Nelson & Ashmore, LLP, its attorneys, and hereby submits this Statement of Issues pursuant to SDCL 1-26-31.4.

1. Whether the Water Management Board's ("Board") *Order Denying Powertech [sic] Motion to Amend Procedural Order, Denying Clean Water Alliance's Motion to Allow Electronic Service, and Updating parties of Record*, dated December 8, 2021, is in violation of SDCL 1-26-36 (1), (2), and (6).
2. Whether the Water Management Board's ("Board") *Order Denying Powertech [sic] Motion to Amend Procedural Order, Denying Clean Water Alliance's Motion to Allow Electronic Service, and Updating parties of Record*, dated December 8, 2021, is in violation of the due process provisions of the Constitution of the United States and the South Dakota Constitution because it deprives Powertech of the opportunity to be heard.

Attached is a copy of *Order Denying Powertech [sic] Motion to Amend Procedural Order, Denying Clean Water Alliance's Motion to Allow Electronic Service, and Updating parties of Record*, dated December 8, 2021.

Dated: 2/7/2022.

GUNDERSON, PALMER, NELSON
& ASHMORE, LLP

By: /s/ Richard M. Williams

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