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JUN 21 2021

WATER RIGHTS
PROGRAM

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June 17, 2021

Jim Hutmacher, Chairman
DANR – Water Management Board
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Re: *In the Matter of Water Permit Application Nos. 2685-2 and 2686-2, and In the Matter of the 2012 Groundwater Discharge Plan Application Submitted by Powertech (USA) Inc.*

Dear Chairman Hutmacher:

Enclosed please find a copy of the Water Right Program's and Surface Water Quality Program's Response in Opposition to Proposed Amendment of the Procedural Order in regard to the above-entitled matter.

Sincerely,

A handwritten signature in cursive script that reads "Ann F. Mines Bailey".

Ann F. Mines Bailey
Assistant Attorney General

AFM/jm
Enclosures

cc/encl: All Parties of Record Noted in Certificate of Service

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JUN 21 2021

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

WATER RIGHTS
PROGRAM

IN THE MATTER OF WATER PERMIT)	
APPLICATIONS NOS. 2685-2 AND)	
2686-2, POWERTECH (USA), INC.)	WATER RIGHT PROGRAM'S AND
	SURFACE WATER QUALITY
	PROGRAM'S RESPONSE IN
IN THE MATTER OF THE 2012)	OPPOSITION TO PROPOSED
GROUNDWATER DISCHARGE PLAN)	AMENDMENT OF THE
APPLICATION SUBMITTED BY)	PROCEDURAL ORDER
POWERTECH (USA), INC.)	

Pending before the Board is Powertech's Motion to Amend the Procedural Order in which Powertech proposes a number of quickly approaching deadlines and a resumption, at the Water Management Board's regularly scheduled meeting in October 2021, of the previously-stayed hearing held to consider Powertech's pending applications. For the reasons set forth below, the Water Rights Program and the Surface Water Quality Program² (Programs) oppose the proposed amendments.

¹ On April 19, 2021, the South Dakota Department of Environment and Natural Resources (DENR) became the South Dakota Department of Agriculture and Natural Resources (DANR). Accordingly, the Department name has been altered.

² During the merger of the South Dakota Department of Environment and Natural Resources and the South Dakota Department of Agriculture, the Groundwater Quality Program was subsumed by the Surface Water Quality Program. Thus, while the underlying authority to review the application, propose a recommendation and conditions, and issue and oversee the pertinent permit have not been altered, the Program name has been changed.

First, the Programs disagree with the inference left by Powertech's motion that, but for the acquisition of the necessary state permits, it would be able to commence its mining activity.³ As provided in the brief submitted by the Programs setting forth the procedural background and current status of this matter, and in Powertech's brief in support of its instant motion, Powertech is required to obtain several federal permits before it may commence its project.

As previously set forth, 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.*

³In its brief, Powertech asserts that "Powertech submitted its Ground Water Discharge Plan Application on March 9, 2012, and received conditional approval of the same on December 12, 2012." Brief in Support of Motion to Amend Procedural Order dated May 28, 2021, p. 2. This statement, however, is inaccurate. Powertech has not received conditional approval of its Groundwater Discharge Plan Application. Rather, the Secretary has recommended conditional approval. See <https://denr.sd.gov/powertech/wmb/NoticeofRecommendationGWDP.pdf>. The purpose of this hearing is to determine whether the application should, in fact, be approved.

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. Petitioners' Brief was submitted on April 19, 2021. Respondent's brief was filed on June 3, 2021. The remainder of the briefing schedule is as follows: Petitioners' reply brief is due July 1, 2021; the deferred appendix is due July 8, 2021; and the final briefs are due July 22, 2021. Petitioners are alleging a variety of violations involving NEPA and NHPA as well as errors in the technical analysis of the license and the final supplemental environmental impact study.

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). Given the change in presidential administration, EPA requested a stay of proceedings. On February 23, 2021, the EAB granted a 60 day stay and required a status update on April 19, 2021. On April 19, 2021, EPA filed a status report and requested a further stay of proceedings. See Status Report and Motion for Stay of Proceedings, dated April 19, 2021 at [https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/Filings%20By%20Appeal%20Number/BEFF4030DBE5B79D852586BD0045370C/\\$File/R8%20Status%2](https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/Filings%20By%20Appeal%20Number/BEFF4030DBE5B79D852586BD0045370C/$File/R8%20Status%2)

0Update%20%26%20Motion%20for%20Stay%20-%204-19-2021.pdf. In its report and motion, EPA explained that NRC was designated as the lead agency for issues involving NHPA and that, given those issues were currently being reviewed by the D.C. Court of Appeals, the outcome could result in EPA requesting a remand of these permits. In its Motion, EPA contends that a stay would not result in prejudice to Powertech as Powertech has yet to obtain the necessary state permits to commence the project. Though the parties in the proceeding before the EAB have subsequently filed several other pleadings and responses, the EAB issued an Order on June 2, 2021, reiterating that the matter is currently stayed.

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. Though initially scheduled for briefing, the matter is currently being held in abeyance pending the outcome of the agency review of the Class III and Class V permits. The Eighth Circuit has ordered that the parties submit a status report by July 12, 2021.

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. No further information was found regarding the status of this approval.

While the NRC permit has issued and EPA has granted the aquifer exemption, it cannot be said that final agency action has occurred with respect to the Class III and Class V permits. See 40 C.F.R. § 124.15(b) (providing “A final permit decision. . . shall become effective 30 days after the service of notice of the decision unless . . . [r]eview is requested on the permit [by the Environmental Appeals Board]” See also 40 C.F.R. § 124.19(m). In this instance, review by the EAB was requested, and thus, the permits are not effective and will not be effective until such time as the EAB has ruled. Moreover, Powertech may not conduct activities on a portion of the site until it receives approval from the BLM. Thus, while Powertech has moved through a portion of the federal permitting process, the process is not finalized.

While there is no legal impediment to restarting these proceedings at this time, there is no legal obligation to do so either. It is within the Board’s discretion to determine the appropriate time to resume these proceedings. An examination of the recitation of the federal proceedings illustrates not only how lengthy federal proceedings can be, but also how a permit can be remanded and required to be altered. The Board would be within its authority to determine that it is more efficient to continue the stay of these proceedings until such time as the permits are finalized or even until such time as the federal appeals have concluded.

Moreover, Powertech's proposed amendments to the procedural order are inadequate and far too time restrictive in many respects. A number of considerations that are not included in Powertech's proposal must be entertained and determinations made in the course of setting the schedule to resume these proceedings. For instance, it is clear that the contact information for over 100 of the 300+ intervenors is not accurate. The Programs' last mailing resulted in a return of 108 envelopes as undeliverable. While it may be common sense to update one's contact information in these situations, intervenors/petitioners were not admonished to do so. Additionally, it is believed that some intervenors/petitioners have passed away. The Programs would urge the Board to make a determination as to how to proceed regarding these intervenors/petitioners who have not provided current contact information.

Powertech proposes that supplementation of discovery and experts be completed 45 days prior to the hearing date. While the Programs agree that there should be a limited period of supplementation of discovery, mere supplementation is not the reality of the situation when it comes to experts. The expert originally designated by Water Rights who also authored the initial report regarding the applications, Ken Buhler, has since retired. Water Rights will be unable to call Mr. Buhler to testify. Accordingly, another engineer must be assigned to review the initial report and author his or her findings in a new report. Based upon that review, the current Chief Engineer will have to issue a

new recommendation.⁴ It is highly probable that other parties will also have to secure new experts and have those experts review the materials and provide their own reports. While there should not be an unlimited time to secure experts and produce expert reports, it will take more than the approximate 45 days provided under Powertech's proposal.⁵

The Water Rights Program would request a minimum of ninety days from the date the Board issues an order that would result in the resumption of these proceedings to complete these reports and recommendations given the fact that this is the busiest time of the year for the Program. A number of tasks can only be completed during the warmer months and some of those important tasks were unable to be completed last year given the COVID-19 pandemic. Additionally, most of South Dakota is currently in a drought thus requiring more manpower to manage complaints and an increased number of other filings and necessary on-site visits.

⁴ Chief Engineer, Garland Eberle, who initially recommended approval has retired. His successor, Jeanne Goodman, adopted Chief Engineer Eberle's recommendation after consultation with Mr. Buhler and reviewing his report. The position of the Chief Engineer is now held by Eric Gronlund. While Chief Engineer Gronlund has reviewed Mr. Buhler's report, he does not have the opportunity to consult with Mr. Buhler. Accordingly, Chief Engineer Gronlund will necessarily have to base his recommendation upon the most current assessment provided by the engineer assigned to conduct the review.

⁵ Under Powertech's proposal, the hearing would be held at October 6, 2021. "Supplemental" expert disclosure would be due 45 days prior (August 20, 2021). Assuming that a scheduling order would not issue until the Board's July 6 meeting, that would allow the parties 45 days to secure experts and provide expert reports.

Given that it is the report and the recommendation upon which the proceedings are based, it makes little sense to conduct supplemental discovery or “supplemental” disclosures of experts until such time as those reports and recommendations are issued.

Additionally, under the previous procedural order, the intervenors/petitioners were not only allowed to elect their level of participation, but they were also able to change that selection until a reasonable time prior to the proceedings. As previously noted, the Board received testimony from all Class B participants and had just commenced the taking of evidence from the Class A participants. Determinations should be made as to whether intervenors/petitioners should be allowed to re-elect their level of participation – especially once a decision is made regarding contact information and how to proceed if current contact information is not provided. Depending on what the Board concludes and what contact information is received or not received, it may be necessary to re-open the Class B testimony portion of these proceedings.

Powertech’s proposed order also fails to account for the need for the Board to determine the location of the hearings. Previously, the Board determined that the hearings should be held in Rapid City, SD. The Programs believe that the Board should revisit this determination in light of technological issues and the guidelines issued by the Centers for Disease Control regarding COVID-19. Though many have received vaccination, there are still many who have not been vaccinated. The current CDC guidelines vary based upon

vaccination status. Accordingly, the hearings must be held in a location that would allow for at least some level of social distancing. Furthermore, not every location has the same technologic capabilities. While arrangements could be made in many locations to livestream the audio of the hearings, not every location will afford the opportunity to allow Board members or participants to appear remotely. Over the last year, some investigation has been done to locate a facility outside of Pierre, SD that would afford the space necessary for some social distancing and the technological capability to allow Board members to appear remotely without success. Thus, the Board should revisit the determination of the location of the hearings and what technology should be available during the course of these hearings.

Finally, the composition of the Board has changed somewhat since the commencement of these proceedings. A new Board member has been appointed who was not in attendance when the Board heard testimony from the Class B participants or the commencement of evidence from the Class A participants. It is also likely that those Board members who were present may not recall the evidence that was received approximately eight years ago. To that end, transcripts of the prior proceedings should be produced. Time should be allotted for the production of those transcripts and for Board members and the parties to review. Under the proposed amendment, there would only be 90 days allotted for this. Inquiry should be made as to how long it would take the court reporter(s) to produce the necessary transcripts before

setting the schedule in order to afford sufficient time for review before the resumption of taking evidence.

This matter has been stayed for approximately eight years at the request of Powertech so that it could obtain the necessary federal permits. During that time, Powertech's federal permits still have not been finalized. While Powertech feels that the federal process is far enough along to warrant resumption of the state permitting process, the Board may not find it to be in the interests of efficiency to proceed prior to the finalization of the federal permits given the eight-year interruption. Furthermore, it seems only fair to allow sufficient time (more than 60-90 days) for the parties to prepare for hearing after an eight-year hiatus. For these reasons, the Programs oppose Powertech's proposed amendments to the procedural order and will be ready to discuss these concerns whenever the matter is scheduled for hearing.

Dated this 17th day of June, 2021.



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

The undersigned hereby certifies that a true and correct copy of WATER RIGHT PROGRAM'S AND SURFACE WATER QUALITY PROGRAM'S RESPONSE IN OPPOSITION TO PROPOSED AMENDMENT OF THE PROCEDURAL ORDER in the above entitled matter was served upon the following by enclosing the same in envelopes with first class postage prepaid and affixed thereto, and depositing said envelopes in the United States mail on June 17, 2021:

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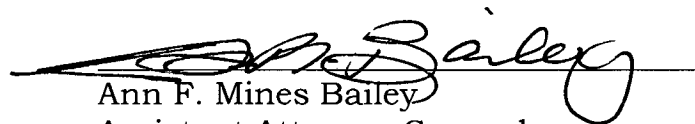
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And on the same date the original was mailed interoffice to Ron Duvall, Joe Foss Building, 523 E. Capitol Ave, Pierre, SD 57501, a copy was mailed interoffice to Jim Hutmacher, Chairman, DANR – Water Management Board Foss Building, 523 East Capitol Ave., Pierre, SD 57501 and a copy was hand delivered to David McVey, Assitant Attorney General, Counsel for Water Mangement Board, Office of the Attorney General 1302 E. HWY 14, Suite 1, Pierre, SD 57501.


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