

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

William J. Froehlich, Chairman
Dr. Richard F. Cole
Dr. Mark O. Barnett

In the Matter of

POWERTECH USA, INC.

(Dewey-Burdock
In Situ Uranium Recovery Facility)

Docket No. 40-9075-MLA

ASLBP No. 10-898-02-MLA-BD01

May 20, 2014

ORDER
(Removing Temporary Stay and
Denying Motions for Stay of Materials License Number SUA-1600)

I. INTRODUCTION

On April 8, 2014 the NRC Staff issued NRC Source Materials License No. SUA-1600¹ to Powertech (USA), Inc. (Powertech) pursuant to 10 C.F.R. § 2.1202(a).² The license allows Powertech to possess and use source and byproduct material in connection with the Dewey-Burdock Project.³ On April 14, 2014 the Oglala Sioux Tribe and the Consolidated Intervenors

¹ Materials License, NRC Form 374 (Apr. 8, 2014) (ADAMS Accession No. ML14043A392). See also, ADAMS Accession Package Number ML14043A052, which includes the license transmittal letter, the license, and the Final Safety Evaluation Report. The NRC Staff also issued its Record of Decision for the Dewey-Burdock Uranium In-Situ Recovery (ISR) Project at ADAMS Accession No. ML14066A466. The Final Programmatic Agreement was executed April 7, 2014 and is available in ADAMS Accession Package No. ML14066A344.

² Under 10 C.F.R. § 2.1202(a) the NRC Staff may issue a license “during the pendency of any hearing under this subpart.”

³ Materials License, NRC Form 374 (Apr. 8, 2014) (ADAMS Accession No. ML14043A392) at 1.

filed timely applications for a stay of the effectiveness of the NRC staff's licensing action on a matter involved in this hearing.⁴ On April 24, 2014 the NRC Staff and Powertech filed oppositions to Intervenor's motions.⁵ The Oglala Sioux Tribe filed an answer in support of the Consolidated Intervenor's motion on April 24, 2014.⁶

On April 30, 2014 the Board granted a temporary stay of Powertech's NRC license, pending an oral argument among the parties.⁷ The temporary stay was issued to prevent any immediate and irreparable harm to any cultural or historic resources caused by earthwork or ground disturbance within the Dewey-Burdock sites and to preserve the status quo until the Board was able to hold an oral argument on the motions for a stay. The oral argument was held by telephone on Tuesday, May 13, 2014.⁸

II. LEGAL STANDARDS

The purpose in granting a stay is to preserve the status quo until a decision can be made on the merits of the underlying controversy. The grant of a stay is an extraordinary

⁴ Oglala Sioux Tribe's Motion for Stay of Effectiveness of License (Apr. 14, 2014) [hereinafter OST Stay Motion]; Consolidated Intervenor's Application for a Stay of the Issuance of License No. SUA-1600 Under 10 CFR Section 2.1213 (Apr. 14, 2014) [hereinafter CI Stay Motion].

⁵ NRC Staff's Opposition to Applications for a Stay (Apr. 24, 2014) [hereinafter Staff Opposition]; Powertech (USA) Inc's Response to Consolidated Intervenor and the Oglala Sioux Tribe Motions for Stay of the Effectiveness of NRC License No. SUA-1600 (Apr. 24, 2014) [hereinafter Powertech Response].

⁶ Oglala Sioux Tribe's Answer in Support of Consolidated Intervenor's Motion for Stay of Effectiveness of License (Apr. 24, 2014).

⁷ Order (Temporarily Granting Stay of Materials License Number SUA-1600) (Apr. 30, 2014) (unpublished).

⁸ Tr. at 578–637.

remedy, and a rare occurrence in NRC practice.⁹ In determining whether to grant or deny an application for a stay, a Board must balance:

- (1) Whether the requestor will be irreparably injured unless a stay is granted;
- (2) Whether the requestor has made a strong showing that it is likely to prevail on the merits;
- (3) Whether the granting of a stay would harm other participants; and
- (4) Where the public interest lies.¹⁰

Discussing these four factors in the context of 10 C.F.R. § 2.342(e), the Commission has stated that “of these factors, irreparable injury is the most important.”¹¹ And for a potential injury to be irreparable, it must be shown to be “imminent . . . certain and great.”¹² If a strong showing of irreparable injury can be shown, “a movant need not always establish a high probability of success on the merits.”¹³ But if a party moving for a stay fails to show irreparable injury, a Board may still grant a stay if the movant has made “an overwhelming showing” or a demonstration of “virtual certainty” that it will prevail on the merits.¹⁴ If the movant cannot show either irreparable injury or that it is likely to prevail on the merits, a Board “need not consider the

⁹ U.S. Dep’t of Energy (High-Level Waste Repository), CLI-05-27, 62 NRC 715, 718 (2005) (treating a stay as “an extraordinary equitable remedy” (quoting Pub. Serv. Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-27, 6 NRC 715, 716 (1977))).

¹⁰ 10 C.F.R. § 2.1213(d).

¹¹ S. Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4), CLI-12-11, 75 NRC 523, 529 (2012) (citing Shieldalloy Metallurgical Corp. (Decommissioning of the Newfield, New Jersey Site), CLI-10-8, 71 NRC 142, 151 (2010) and David Geisen, CLI-09-23, 70 NRC 935, 936 & n.4 (2009)).

¹² Vogtle, CLI-12-11, 75 NRC at 529 (quoting Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), CLI-06-8, 63 NRC 235, 237 (2006)).

¹³ Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-820, 22 NRC 743, 746 n.8 (1985) (quoting Cuomo v. NRC, 772 F.2d 972, 974 (D.C. Cir. 1985)).

¹⁴ Vogtle, CLI-12-11, 75 NRC at 529 (quoting AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-08-13, 67 NRC 396, 400 (2008) and Shieldalloy Metallurgical Corp. (Decommissioning of the Newfield, New Jersey Site), CLI-10-8, 71 NRC 142, 154 (2010)).

remaining factors.”¹⁵ In addressing the stay criteria in a Subpart L proceeding, “a litigant must come forth with more than general or conclusory assertions in order to demonstrate its entitlement” to relief.¹⁶ On a motion for a stay, the burden of persuasion on the four factors of listed in 10 C.F.R. § 2.1213, *supra*, is on the movant.¹⁷

III. DISCUSSION

A. Irreparable Injury

To qualify as an irreparable injury, the potential harm cited by the moving party first “must be related” to the underlying claim that is the focus of the adjudication.¹⁸ Here, the Oglala Sioux Tribe and Consolidated Intervenors both base their motions for a stay on potential destruction of the Tribe’s cultural resources and alleged continuing violations of NEPA and NHPA compliance.¹⁹ These issues are the contentions at issue in the upcoming evidentiary hearing. Contention 1A concerns the protection of historical and cultural resources, and Contentions 1B, 2, 3, 4, 6, 9, and 14B concern alleged failures in the FSEIS and NHPA processes.²⁰

¹⁵ Vogtle, CLI-12-11, 75 NRC at 529. This Order will discuss irreparable injury and the likelihood to prevail on the merits, but will not consider the remaining factors.

¹⁶ Babcock and Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-92-31, 36 NRC 255, 263 (1992) (citing United States Dep’t of Energy (Clinch River Breeder Reactor Plant), ALAB-721, 17 NRC 539, 544 (1983)).

¹⁷ Public Serv. Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-493, 8 NRC 253, 270 (1978); Alabama Power Co. (Joseph M. Farley Nuclear Plant Units 1 and 2), CLI-81-27, 14 NRC 795, 797 (1981).

¹⁸ Vogtle, CLI-12-11, 75 NRC at 530–31 (quoting United States v. Green Acres Enters., Inc., 86 F.3d 130, 133 (8th Cir. 1996)).

¹⁹ OST Stay Motion at 2–4; CI Stay Motion at 6–7.

²⁰ LBP-14-5, 79 NRC at ___ (slip op. at Appendix A) (Apr. 28, 2014).

A party seeking a stay must also specifically and “reasonably demonstrate [an injury], not merely allege” generalized harm.²¹ The Oglala Sioux Tribe and Consolidated Intervenors both attach declarations purporting to demonstrate the specific irreparable injury that may be suffered.²² These declarations allege that a comprehensive cultural resource study has not been adequately conducted, and that the FSEIS is “not sufficient to identify cultural and historic resources significant to the Oglala Sioux Tribe.”²³ The Tribe alleges that “construction activities slated for the site” before the evidentiary hearing will cause irreparable harm by not ensuring adequate mitigation techniques are used.²⁴ Consolidated Intervenors claim cultural resources are at risk if construction, including “earthwork, massive ground disturbance, roadmaking, and other preparations” begins at the site.²⁵

The NRC Staff counters that the Programmatic Agreement, with which the Intervenors find fault, is sufficient to protect cultural resources, and that the Intervenors’ motions lack specificity.²⁶ Powertech argues that Consolidated Intervenors’ and the Oglala Sioux Tribe’s claims are nothing more than conclusory statements, and unsupported conjecture that historic and cultural resources will be damaged or destroyed within the scope of the NRC licensed activities.²⁷

²¹ Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-814, 22 NRC 191, 196 (1985).

²² See OST Stay Motion, Decl. of Michael CatchesEnemy and Decl. of Wilmer Mesteth; CI Stay Motion, Exs. 1–11 and A1–A2.

²³ OST Stay Motion, Decl. of Michael CatchesEnemy ¶ 9.

²⁴ OST Stay Motion at 3–4.

²⁵ CI Stay Motion at 6.

²⁶ Staff Opposition at 3.

²⁷ Powertech Response at 8–10; 12–14.

Harm to tribal cultural resources does constitute irreparable injury.²⁸ In a District Court case granting a preliminary injunction enjoining a solar energy project, the Quechan Tribe claimed that the project would not avoid most of the 459 cultural sites identified, and that the NEPA and NHPA process had been insufficient.²⁹ In determining that the irreparable harm element of the test for issuance of injunctive relief was met, the court found that the Tribe's evidence showed that phase one of the project would involve damage to at least one known site, and "virtually ensure[d] some loss or damage."³⁰

Here, however, the intervenors' allegations and their supporting declarations lack the specificity needed to demonstrate a serious, immediate, and irreparable harm to cultural and historic resources. As the Eighth Circuit has said, "[A] party must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief."³¹ In this case, the intervenors have not shown that the activities proposed at the Dewey Burdock site are imminent nor that the harm is certain. Indeed, the intervenors have not shown that a clear and present need exists for a stay nor have they addressed the argument that the Programmatic Agreement protects the cultural and historic resources in the area.

Even if it was certain that irreparable harm would result from Powertech's pre-construction activities, staying the effectiveness of the NRC materials license will not forestall these injuries. The NRC license, for which a stay is sought, was issued pursuant to 10 C.F.R. Part 40. It authorizes Powertech to receive, acquire, possess, transfer, use, and deliver

²⁸ United States v. Jenkins, 714 F. Supp. 2d 1213, 1222 (S.D. Ga. Dec. 5, 2008) ("Harming Native American artifacts would constitute an irreparable injury because artifacts are, by their nature, unique, and their historical and cultural significance make them difficult to value monetarily.").

²⁹ Quechan Tribe v. U.S. Dep't of the Interior, 755 F. Supp. 2d 1104, 1106–07 (S.D. Cal. Dec. 15, 2010).

³⁰ Id. at 1120.

³¹ Iowa Util. Bd. v. FCC, 109 F.3d 418, 425 (8th Cir. 1996).

byproduct, source, and special nuclear material.³² Further, the license permits Powertech to commence construction, as construction is defined in 10 C.F.R. § 40.4. Construction is defined as:

the installation of wells associated with radiological operations (e.g., production, injection, or monitoring well networks associated with in-situ recovery or other facilities), the installation of foundations, or in-place assembly, erection, fabrication, or testing for any structure, system, or component of a facility or activity subject to the regulations in this part that are related to radiological safety or security.³³

The term “construction” in Part 40 specifically excludes site exploration, including necessary borings to determine foundation conditions or other preconstruction monitoring to establish background information related to the suitability of the site, the environmental impacts of construction or operation, or the protection of environmental values.³⁴ It also excludes excavation and preparation of the site for construction of the facility, including clearing of the site, grading, installation of drainage, erosion and other environmental mitigation measures, and construction of temporary roads and borrow areas.³⁵

At oral argument, counsel for Powertech stated, without contradiction, that the ground disturbing work contemplated for the next few months could be accomplished without the NRC license.³⁶ Therefore, staying the license would not address the intervenors’ concerns nor would it protect any cultural or historic sites. Indeed, counsel for the NRC Staff observed that in its view having the license remain in effect was more protective because the staff could then take

³² Materials License, NRC Form 374 (Apr. 8, 2014) at 1 (ADAMS Accession No. ML14043A392).

³³ 10 C.F.R. § 40.4.

³⁴ Id.

³⁵ Id.

³⁶ Tr. at 592–93.

enforcement actions should it find violations of the NRC license or the Programmatic Agreement.³⁷

Based on the C.F.R. definitions, staying the effectiveness of Powertech's NRC issued license would have a very limited and incomplete effect on preventing the irreparable injuries the Intervenor's claim Powertech may cause. Even if its NRC license is stayed by the Board, Powertech will still be permitted to engage in the earth moving activities on which the irreparable injury claim is premised. As a result, the injuries alleged in the Intervenor's motions are not redressable by the Board granting a stay of Powertech's license. The Board declines to issue an Order which would have no practical effect.³⁸

B. Likelihood to Prevail on the Merits

At its heart, the dispute over a stay boils down to a disagreement over the NHPA consultation process. Intervenor's argue that the process by which the Programmatic Agreement was created was inadequate, and therefore fails to fully protect the Tribe's sensitive and significant historic and cultural resources. Powertech and the NRC Staff disagree and believe the Programmatic Agreement memorialized a fair and adequate process that fully protects all potential cultural and historic resources at the Dewey-Burdock sites.

This issue will be adjudicated by this Board at the upcoming evidentiary hearing.³⁹ At this hearing, and in the prefiled statements of position and testimony, all parties will have the

³⁷ Tr. at 620.

³⁸ In Pacific Gas and Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-03-10, 58 NRC 127, 129 (2003) the Commission held a stay request in abeyance during settlement negotiations, basing the delay, in part, on the rationale that "in practical terms, [the stay request would have] no current effect." See also Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Unit 3), LBP-74-42, 7 AEC 1022, 1037 (1974) (declining to take a "meaningless" action and allow a hearing request when that hearing had already been held). In the context of Article III standing, a court may only hear a case when the relief requested is likely to redress the injury. Lujan v. Defenders of Wildlife, 504 U.S. 555, 590 (1992).

³⁹ Memorandum (Summarizing the February 12, 2014 Teleconference) (Feb. 20, 2014) at Appendix A (unpublished) (setting the evidentiary hearing to begin on August 19, 2014).

opportunity to present specific and detailed evidence supporting their respective positions to the Board. The Board will then make its decision based on this specific and detailed evidence. Since the potential harm is not redressable by the Board, we decline to make any estimation as to the Intervenor's likelihood of success on the merits at this point in time.

IV. BOARD ORDER

The Board rules that:

- A. The temporary stay of Materials License Number SUA-1600, issued April 30, 2014⁴⁰ is lifted.
- B. The motions for a stay of the effectiveness of Materials License Number SUA-1600 filed by Consolidated Intervenor and the Oglala Sioux Tribe on April 14, 2014⁴¹ are denied.
- C. As the Board ruled during the May 13, 2014 teleconference,⁴² the unopposed Joint Motion to Clarify Filing Deadlines filed on April 30, 2014⁴³ is granted.
- D. Consolidated Intervenor's Motion to Strike Pages 11-21 of Powertech Response to Stay filed May 13, 2014⁴⁴ was untimely⁴⁵ and is therefore denied.⁴⁶

⁴⁰ Order (Temporarily Granting Stay of Materials License Number SUA-1600) (Apr. 30, 2014) (unpublished).

⁴¹ OST Stay Motion; CI Stay Motion.

⁴² Tr. at 635.

⁴³ Joint Motion to Clarify Filing Deadlines (Apr. 30, 2014).

⁴⁴ Consolidated Intervenor's Motion to Strike Pages 11-21 of Powertech Response to Stay (May 13, 2014).

⁴⁵ 10 C.F.R. § 2.323(a)(2) requires all motions to be filed within ten days from the occurrence which triggers the motion. This motion to strike was filed eight days after this ten day period ended on May 5, 2014. Tr. at 636.

⁴⁶ The Board, however, notes that it finds Powertech's answer in violation of the Commission's regulations because it exceeded the ten-page reply length intended by 10 C.F.R. § 2.342(d). The regulation permits an answer to be filed "opposing the granting of a stay. This answer may

E. No specific section of the Commission's regulations, including 10 C.F.R. § 2.1210 and 10 C.F.R. § 2.1212, permits appeals from an order ruling on a request for a stay of the effectiveness of the NRC staff's action on a matter involved in a hearing under Subpart L. Nonetheless, interlocutory review of decisions and actions of a presiding officer may be available pursuant to § 2.341(f)(2) of the Commission's regulations.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

William J. Froehlich, Chair
ADMINISTRATIVE JUDGE

/RA/

Richard F. Cole
ADMINISTRATIVE JUDGE

/RA/

Mark O. Barnett
ADMINISTRATIVE JUDGE

Rockville, Maryland
May 20, 2014

not be longer than ten (10) pages." The regulation contemplates a single ten-page opposition to a stay, not ten pages of opposition to each motion filed.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
POWERTECH (USA) INC.) Docket No. 40-9075-MLA
(Dewey-Burdock In Situ Recovery Facility))
)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **ORDER (Removing Temporary Stay and Denying Motions for Stay of Materials License Number SUA-1600)** have been served upon the following persons by Electronic Information Exchange, and by electronic mail as indicated by an asterisk*.

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POWERTECH (USA) INC., DEWEY-BURDOCK IN SITU RECOVERY FACILITY
DOCKET NO. 40-9075-MLA

**ORDER (Removing Temporary Stay and Denying Motions for Stay of Materials License
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[Original signed by Clara Sola]
Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 20th day of May 2014.