

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

September 8, 2014

POST HEARING ORDER

Powertech originally submitted an application for a combined source and 11e.(2) byproduct material license to construct and operate the proposed Dewey-Burdock ISL facility in the Black Hills region of South Dakota on February 25, 2009.¹ In June, 2009, Powertech withdrew the application in order to revise the application to provide additional NRC Staff-requested information on hydrology/site characterization, waste disposal, location of extraction operations, protection of water resources, and operational issues.² Powertech re-submitted its Dewey-Burdock license application on August 10, 2009 with additional data and information

¹ Powertech (USA) Inc.'s Submission of an Application for a Nuclear Regulatory Commission Uranium Recovery License for its Proposed Dewey-Burdock In Situ Leach Uranium Recovery Facility in the State of South Dakota (Feb. 25, 2009) (ADAMS Accession No. ML091030707).

² Dewey-Burdock Project Supplement to Application for NRC Uranium Recovery License Dated February 2009 (August 2009) (ADAMS Accession No. ML092870155).

requested by the NRC Staff.³ The NRC Staff accepted Powertech's Application for docketing on October 2, 2009,⁴ and on January 5, 2010 published a notice of opportunity to request a hearing on the Application.⁵

In their hearing requests, the Oglala Sioux Tribe and the Consolidated Intervenors submitted a total of 21 contentions raising a variety of safety and environmental challenges to Powertech's application. The Atomic Safety and Licensing Board (Board) granted both parties intervenor status and admitted seven contentions.⁶ These contentions related to cultural resources (Consolidated Intervenors' Contention A and Oglala Sioux Tribe's Contention 1), baseline groundwater conditions (Contentions B and 2), hydrogeology (Contentions C and 3), and groundwater consumption (Contention 4).⁷

The NRC Staff issued the Draft Supplemental Environmental Impact Statement (DSEIS) in November 2012, and in response the Oglala Sioux Tribe and the Consolidated Intervenors submitted 18 new or amended contentions. The Board found that each of the Intervenors' previously admitted contentions challenged information in the DSEIS that was similar to information in Powertech's Environmental Report.⁸ Thus, the Board found that the admitted

³ Exhibit NRC-008-A-1, Supplement to the Generic Environmental Impact Statement for In-Situ Leach Uranium Milling Facilities, Final Report, NUREG-1910 (Supp. 4 Jan. 2014) at 1-1 (ADAMS Accession Nos. ML14024A477 (Chapters 1–5) and ML14024A478 (Chapters 6–11 and Appendices)) [hereinafter FSEIS].

⁴ Results of Acceptance Review, Powertech (USA), Inc.'s Proposed Dewey-Burdock Facility, Fall River and Custer Counties, South Dakota, Letter from Ronald Burrows, Project Manager, NRC, to Richard Blubaugh, Vice President, Powertech (Oct. 2, 2009) (ADAMS Accession No. ML092610201).

⁵ 75 Fed. Reg. 467 (Jan. 5, 2010).

⁶ LPB-10-16, 72 NRC 361, 443–44 (2010).

⁷ Id.

⁸ LBP-13-9, 78 NRC 37, 50–60 (2013).

contentions “migrated” from the Environmental Report to the DSEIS.⁹ The Board also admitted three new contentions of the Oglala Sioux Tribe.¹⁰ The Board combined the Oglala Sioux Tribe and the Consolidated Intervenors related contentions and split two contentions into subparts.

The admitted contentions were as follows:¹¹

- Contention 1A: Failure to Meet Applicable Legal Requirements Regarding Protection of Historical and Cultural Resources.
- Contention 1B: Failure to Involve or Consult All Interested Tribes as Required by Federal Law.
- Contention 2: The DSEIS Fails to Include Necessary Information for Adequate Determination of Baseline Ground Water Quality.
- Contention 3: The DSEIS Fails to Include Adequate Hydrogeological Information to Demonstrate Ability to Contain Fluid Migration and Assess Potential Impacts to Groundwater.
- Contention 4: The DSEIS Fails to Adequately Analyze Ground Water Quantity Impacts.
- Contention 6: The DSEIS Fails to Adequately Describe or Analyze Proposed Mitigation Measures.
- Contention 9: The DSEIS Fails to Consider Connected Actions.
- Contention 14A: Whether an appropriate consultation was conducted pursuant to the Endangered Species Act and implementing regulations.
- Contention 14B: Whether the DSEIS’s impact analyses relevant to the greater sage grouse, the whooping crane, and the black-footed ferret are sufficient.

The NRC Staff issued its Final Supplemental Environmental Impact Statement (FSEIS) on January 29, 2014.¹² The Oglala Sioux Tribe and the Consolidated Intervenors then re-filed

⁹ Id.

¹⁰ Id. at 114.

¹¹ The list of contentions to be heard at the hearing appeared as Appendix A of the Board’s decision. LBP-13-9, 78 NRC at 116.

¹² Notice of Availability of the FSEIS, Letter from Patricia Jehle, NRC, to Administrative Judges and Parties (Jan. 29, 2014) (ADAMS Accession No. ML14029A663).

each of their previously admitted contentions. The Oglala Sioux Tribe also filed three new contentions. The Board found that the Intervenor's previously admitted contentions migrated from the DSEIS to the FSEIS and that these contentions remained at issue in the hearing.¹³ The Board rejected the Oglala Sioux Tribe's new contentions challenging the FSEIS.¹⁴

On June 20, 2014 the Oglala Sioux Tribe voluntarily withdrew Contentions 14A and 14B.¹⁵ On July 15, 2014, the Board dismissed these contentions based on this voluntary withdrawal.¹⁶

On August 19, 20 and 21, 2014, the Board held an evidentiary hearing at the Hotel Alex Johnson in Rapid City, SD concerning the seven contentions raised by the Oglala Sioux Tribe and the Consolidated Intervenor's.

This order establishes a post-hearing procedural schedule and a legal issue briefing schedule which will coincide with the filing of proposed findings of fact and conclusions of law. This order also addresses the outstanding motions concerning mandatory disclosure, review of well data logs, and further evidentiary submissions that may or may not be necessary because of a failure on the part of Powertech to make timely and complete mandatory disclosures in this proceeding.

¹³ LBP-14-5, 79 NRC __, __ (slip op. at 30) (Apr. 28, 2014).

¹⁴ Id. at 30–31.

¹⁵ Oglala Sioux Tribe's Statement of Position on Contentions (June 20, 2014) at 41–42.

¹⁶ Order (Granting Request to Withdraw and Motion to Dismiss Contentions 14A and 14B) (July 15, 2014) (unpublished).

I. Proposed Transcript Corrections

All proposed transcript corrections are due by September 19, 2014.¹⁷ Transcript corrections are primarily to correct typographical, spelling or acronym issues. Proposed corrections should reflect the actual testimony that was spoken at hearing; it is not an opportunity to rehabilitate or change the spoken testimony.

II. August 16, 2014 Oglala Sioux Tribe Motion

On August 16, 2014, the Oglala Sioux Tribe moved the Board to compel Powertech to disclose the following documents:

- (1) documents containing bore-hole data referenced in Powertech's August 7, 2014 email to the Board;
- (2) a take permit application that Powertech submitted to the U.S. Fish and Wildlife Service in January 2014; and
- (3) correspondence with the U.S. Bureau of Land Management (BLM), including a July 8, 2014 letter from BLM requesting additional information on Powertech's Plan of Operations and any Powertech responses to the letter.¹⁸

The Oglala Sioux Tribe requests an Order from the Board requiring these three document sets to be disclosed which it believes are subject to mandatory disclosure. The Oglala Sioux Tribe states that "to the extent these documents or data compilations were not previously disclosed and present new information, the Tribe asserts that is [sic] allowed an opportunity to review the material for possible additional contentions pleading."¹⁹ The Oglala Sioux Tribe further requests that, to the extent the Board finds that Powertech has not complied with the disclosure requirements, the Board should consider sanctions against Powertech,

¹⁷ Tr. at 1324.

¹⁸ Oglala Sioux Tribe's Motion to Enforce Mandatory Disclosure Duties Under 10 C.F.R. § 2.336 (Aug. 16, 2014) at 1.

¹⁹ Id. at 7.

which could include invalidation of the license and denial of the application, as provided for in 10 C.F.R. § 2.336(e)(1).²⁰

On August 26, 2014 the NRC Staff responded to the Oglala Sioux Tribe's motion stating it believed that Powertech had already offered to make all borehole data available, and that the take permit and BLM correspondence requests could be resolved quickly if Powertech submitted the materials for in camera review by the Board to determine relevance to any of the admitted contentions.²¹ Powertech also responded on August 26, 2014 stating that it has proposed to implement a protective order to preserve the confidential nature of the information responsive to request 1 (bore-hole logs) and has agreed to produce CD copies of any and all digitized data associated with the data and information requested.²² Powertech also stated it will make any and all data and information associated with these requests [for bore-hole logs], including paper or Mylar logs and location maps, available in its Edgemont office beginning August 27, 2014, at 8 a.m., assuming the protective order is in place.²³

Powertech, while apparently willing to make the bore-hole logs available subject to a protective order, maintains (1) the "take" permit application, (2) the correspondence it has had with the BLM, and (3) the draft avian monitoring plan are not relevant to the admitted contentions.²⁴ Powertech argues that the "take" permit application contains information which is "already available in the current NRC record of decision," that the information is "already in the public domain in the FSEIS" and that as the application "essentially provides no new

²⁰ Id.

²¹ NRC Staff's Response to Oglala Sioux Tribe's August 16, 2014 Motion (Aug. 26, 2014)

²² Powertech (USA), Inc. Response to Oglala Sioux Tribe's Motion for Mandatory Disclosures (Aug. 26, 2014) at 2.

²³ Id.

²⁴ Id. at 3–6.

information, it should not be disclosed.”²⁵ As to the letter from the BLM and the response not yet filed, Powertech alleges the July 8, 2014 correspondence requesting additional information “has no relevance to the NRC licensing process or the admitted contentions” and that the “correspondence is merely a compilation of questions that BLM has asked Powertech to supplement its administrative record for the potential issuance of a BLM Plan of Operations.”²⁶ Finally, as to the avian monitoring plan, Powertech argues the requested “draft plan is a working document at this time” and that the plan is “already in the public domain in the FSEIS.”²⁷ Powertech states, “the only relevance to this proceeding is whether an avian plan pursuant to State requirements is part of the FSEIS development process and how it would address potential impacts to avian species and not its substance.”²⁸ Powertech agrees with the NRC Staff that the Board should review the requested materials in camera before ruling on its relevance to the contentions and whether it must be disclosed.²⁹

III. Mandatory Disclosure

The evidentiary hearing in this case is being conducted under 10 C.F.R. Part 2, Subpart L, and therefore 10 C.F.R. § 2.336 governs all discovery and disclosure of documents related to this proceeding. Section 2.336(a) requires that “all parties . . . without further order or request from any party, disclose and provide . . . (2)(i) a copy, or a description by category and location,

²⁵ Id. at 3.

²⁶ Id. at 4.

²⁷ Id. at 5.

²⁸ Id. at 6.

²⁹ Id.

of all documents and data compilations in the possession, custody, or control of the party that are relevant to the contentions”³⁰

NRC precedent bearing on the “relevancy” standard in 10 C.F.R. § 2.336 demonstrates that the standard is not a high one, and that the disclosure requirements of the NRC regulations are specifically designed to be “wide-reaching:”

The regulation makes clear that each party must make the mandatory disclosures automatically without the need for a party to file a discovery request. As to the scope of this obligation, the Commission has recently affirmed that “mandatory disclosures . . . which apply to Subpart L proceedings, are wide-reaching.” Crow Butte Resources, Inc. (North Trend Expansion Project) CLI-09-12, 69 NRC 535, 572 (2009).³¹

Indeed, this case further holds that the relevance test in NRC proceedings is even more broad than that applicable in federal court:

The Federal Rules of Evidence (FRE) provide some useful guidance. The FRE state that “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Fed. R. Evid. 401

[T]he relevance standard of 10 C.F.R. § 2.336 is even more flexible than the relevance standard of Fed. R. Evid. 401. First, although the FRE are not mandated for NRC adjudicatory proceedings, the Commission has endorsed the use of the FRE as guidance for the Boards, with the express proviso that Boards must apply the Part 2 rules with greater flexibility than the FRE. See 69 Fed. Reg. at 2,187; 10 C.F.R. § 2.319(d). Second, 10 C.F.R. § 2.336 is a discovery regulation, and the rules are clear that the scope of discovery is broader than the scope of admissible evidence. See 10 C.F.R. § 2.705(b)(1) (“It is not a ground for objection [to discovery] that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.”). See also Fed. R. Civ. P. 26(b)(1). Third, the Commission has stated that the mandatory disclosures in Subpart L proceedings encompass a “wide range of information.” 69 Fed. Reg. at 2,194.³²

³⁰ 10 C.F.R. § 2.336(a)(2)(i).

³¹ Progress Energy Florida, Inc. (Levy County Nuclear Power Plant, Units 1 and 2), LBP-10-23, 72 N.R.C. 692, 701 (2010).

³² Id. at 705–06 (footnote omitted).

IV. Board Ruling on August 16, 2014 Oglala Sioux Tribe Motion

The NRC regulations mandate that, within 30 days of the admission of a contention, each party must disclose to the other parties “all documents and data compilations in the possession, custody, or control of the party that are relevant to the contentions.”³³ Pursuant to that regulation, on September 13, 2010, all parties to this proceeding submitted their initial mandatory disclosures. These mandatory disclosures have been updated every month.³⁴ The obligation to update mandatory disclosures is continuing, and disclosure updates shall include any documents subject to disclosure that were not included in any previous disclosure update.³⁵ The duty to update disclosures relevant to an admitted contention only ends when the presiding officer issues a decision resolving the contention.³⁶

The disclosing party can either provide the other parties with an actual copy of the document or data compilation or simply describe it and provide it if the other party requests it.³⁷ The regulation makes clear that each party must make the mandatory disclosures automatically without the need for a party to file a discovery request. As to the scope of this obligation, the Commission has affirmed that “mandatory disclosures . . . which apply to Subpart L proceedings, are wide-reaching.”³⁸

³³ 10 C.F.R. § 2.336(a)(2)(i).

³⁴ Order (Prehearing Conference Call Summary and Initial Scheduling Order) (Oct. 4, 2010) at 2–3 (unpublished); see also 10 C.F.R. § 2.336(d).

³⁵ 10 C.F.R. § 2.336(d).

³⁶ Id.

³⁷ 10 C.F.R. § 2.336(a)(2)(i).

³⁸ Crow Butte Resources, Inc. (North Trend Expansion Project) CLI-09-12, 69 NRC 535, 572 (2009).

The Board reiterates its conclusion³⁹ that well-logs, also referred to as bore-logs; either in paper form or digital format, whether conducted by Powertech, TVA or another, whether gamma-ray logs, electric logs, self-potential or spontaneous potential logs, resistivity logs, or other geologic-type logs, whether currently in the possession, custody or control of or soon to be acquired by Powertech, are relevant to the issues in Contention 3.⁴⁰ All well-logs/bore-logs shall be made available to the Intervenors and the NRC Staff immediately.⁴¹ The March 5, 2010 Protective Order in this case remains in effect.⁴² Should any party wish to modify or amend the Protective Order, such a party may file a motion for amendment with the Board, in accordance with paragraph 10 of the existing Protective Order.⁴³ Furthermore, pursuant to paragraph 10 of

³⁹ Tr. at 966–971. See also Order (Question Following Prehearing Hearing Conference) (August 6, 2014) at 4 (unpublished). “The data purchased by Powertech and described in Exhibit OST-019 is relevant to the issues in Contention 3, is similar to other TVA data referenced in the testimony of a number of expert witnesses scheduled to be heard at the upcoming evidentiary hearing, and is subject to mandatory disclosure as defined in 10 C.F.R. § 2.336(a).”

⁴⁰ Contention 3 states, “The FSEIS Fails to Include Adequate Hydrogeological Information to Demonstrate Ability to Contain Fluid Migration and Assess Potential Impacts to Groundwater.”

⁴¹ Powertech states it “consents to the Tribe’s request for borehole logs referenced in its August 7, 2014 electronic message to the Licensing Board. As of this day [August 26, 2014], Powertech has circulated a proposal for disclosure of this data and information for counsel’s consideration. By way of summary, Powertech has proposed to implement a protective order to preserve the confidential nature of this information, as well as that of the previously ruled upon newly acquired data, and also has agreed to produce CD copies of any and all digitized data associated with the two sets of data and information requested. These CDs are proposed to be overnight delivered to addresses designated by other counsel. Powertech also will make any and all data and information associated with these requests, including paper or Mylar logs and location maps, available in its Edgemont office beginning tomorrow, August 27, 2014, at 8 a.m., assuming the protective order is in place.” Powertech (USA), Inc. Response to Oglala Sioux Tribe’s Motion for Mandatory Disclosures (Aug. 26, 2014) at 2.

⁴² Memorandum and Order (Protective Order Governing the Disclosure of Sensitive Unclassified Non-Safeguards Information (SUNSI)) (Mar. 5, 2010).

⁴³ Id. at 3.

the Protective Order, the Board retains its power to “alter or amend [the] Protective Order and resolve disputes.”⁴⁴

The Board concludes that (1) the “take” permit submitted to the U.S. Fish and Wildlife Service in January 2014 and (2) the avian plan documents are both relevant to Contention 6 (Mitigation measures). The avian plan is discussed in the FSEIS,⁴⁵ was challenged by intervenors in Contention 6,⁴⁶ and testimony was given at the hearing by Powertech and NRC Staff witnesses on the adequacy of the mitigation plans as they refer to birds and other species.⁴⁷ The Oglala Sioux Tribe also contends that the avian mitigation plan in the FSEIS does not contain sufficient detail.⁴⁸ Mandatory disclosure in a Subpart L hearing is broad and continuing. Materials that discuss the take permit are relevant to contentions in this proceeding or are likely to lead to relevant materials related to the contentions in this proceeding. The Commission’s disclosure regulations are to be broadly construed.

The Board further concludes that the BLM correspondence on the Licensee’s Plan of Operations and responses thereto are relevant to the following contentions in this proceeding: protection of cultural resources (Contention 1A), baseline conditions of and/or measures for protection of aquifers (Contention 2 and Contention 3), analysis of water quantity issues (Contention 4), or development or implementation of mitigation measures (Contention 6). The FSEIS was prepared in cooperation with the BLM. BLM was a cooperating agency with NRC in the evaluation of the impacts of Powertech’s Plan of Operations in accordance with the National Memorandum of Understanding with NRC. BLM manages 97 ha [240 ac] of land within the

⁴⁴ Id. at 3.

⁴⁵ Exhibit NRC-008-A-2, FSEIS Section 4.6.1.1.1.1.2.

⁴⁶ Oglala Sioux Tribe’s Statement of Position on Contentions (June 20, 2014) at 34–35.

⁴⁷ Tr. at 1241–1311. NRC Staff witness Yilma and Powertech witness McKee.

⁴⁸ Oglala Sioux Tribe’s Statement of Position on Contentions (June 20, 2014) at 34.

proposed Dewey-Burdock ISR Project area.⁴⁹ Under 43 C.F.R. § 3809.1(b), BLM is required to review the environmental impacts of federal actions on surface lands to assure that there is no “unnecessary or undue degradation of public lands.” To fulfill this requirement, Powertech submitted a Plan of Operations to BLM for the Dewey-Burdock ISR Project on August 26, 2009.⁵⁰ Powertech modified the Plan of Operations and resubmitted it to BLM on January 28, 2011.⁵¹ BLM has the responsibility to approve the Powertech Plan of Operations subject to mitigation measures included in the license application and the FSEIS.⁵² The Oglala Sioux Tribe, in its statement of position, has alleged that BLM mitigation guidelines in the FSEIS did not contain sufficient analysis.⁵³

The Board orders Powertech to make the correspondence with BLM, including the July 8, 2014 letter from BLM requesting additional information on Powertech’s Plan of Operations and any Powertech responses to the letter, available to the Intervenors and the NRC Staff. BLM materials that discuss the environmental impacts of Powertech’s Plan of Operations (and the mitigation efforts necessary) are relevant to contentions in this proceeding. The Commission’s disclosure regulations are to be broadly construed.

The request to apply 10 C.F.R. § 2.336(e)(1) sanctions to Powertech is denied.⁵⁴

⁴⁹ Exhibit NRC-008-A-2, FSEIS Section 4.2.1.

⁵⁰ Exhibit NRC-008-A-1, FSEIS at 31.

⁵¹ Id.

⁵² Exhibit NRC-008-A-1, FSEIS at 31-32, 59, 61, 74–75.

⁵³ Oglala Sioux Tribe’s Statement of Position on Contentions (June 20, 2014) at 35.

⁵⁴ The Board will not impose sanctions, however it expects the regulations on mandatory disclosures to be strictly adhered to until the issuance of its decision in this proceeding. All parties, without further order or request from any party, shall disclose and provide a copy, or a description by category and location, of all documents and data compilations in the possession, custody, or control of the party that are relevant to the admitted contentions in accordance with 10 C.F.R. § 2.336(a)(2)(i).

V. Supplemental Testimony on Admitted Contentions Based on Newly Disclosed Evidence

The Board will apply the timeframe and deadline for submission of new or amended contentions to any supplemental evidence on existing (admitted) contentions the parties may wish to file based on the data which the Board today directs Powertech to disclose. Pursuant to the Board's Supplemental Initial Scheduling Order, "the Board direct[ed] that a new or amended contention shall be deemed timely under 10 C.F.R. § 2.309(f)(2)(iii) if filed within thirty (30) days from the time that a party receives notice of the availability of the new and material information on which it is based. A party will be deemed to have received notice once: 1) the relevant information is communicated to the party, 2) the party has been notified that the relevant information is publicly available on the NRC's database, or 3) the relevant information is included in a party's mandatory disclosures" ⁵⁵

The parties to this proceeding (Consolidated Intervenors, the Oglala Sioux Tribe and the NRC Staff) shall have access to and the right to review, inspect and copy the newly acquired data Powertech has purchased and all historical well logs in Powertech's possession, custody or control. ⁵⁶ The parties shall further have the right to file additional testimony and exhibits to supplement, support or otherwise bolster their arguments related to Contention 3, based on the newly disclosed well logs. Any supplemental testimony or additional exhibits based on these newly disclosed well logs shall be filed within 30 days of their availability to the parties.

Accordingly, the Board will hold the record open on Contention 3. The supplemental testimony or additional exhibits need only be accompanied by a motion to submit additional testimony and exhibits based on the newly disclosed well logs. Similarly, the record will remain open for 30

⁵⁵ Order (Supplementing Initial Scheduling Order) (Nov. 2, 2010) at 5 (unpublished).

⁵⁶ Tr. at 1180–81. Counsel for Powertech explained that, because the bore-hole data is proprietary information, Powertech would seek a protective order limiting disclosure of the data by either the Oglala Sioux Tribe's or the Consolidated Intervenors' reviewing experts.

days from the date of disclosure by Powertech for any additional testimony or exhibits based on the take permit application that Powertech submitted to the U.S. Fish and Wildlife Service in January 2014 and the BLM correspondence.

The Board will hold the evidentiary record open to facilitate the prompt disclosure by Powertech of the three sets of information requested by the Oglala Sioux Tribe. Disclosure is a continuing obligation of all parties until the Board issues its decision on the admitted contentions. The mandatory disclosure provisions were generally modeled after Rule 26 of the Federal Rules of Civil Procedure, and tailored to reflect the nature and requirements of NRC procedures.⁵⁷ This tailoring of the federal rule was intended to reduce or avoid the need for interrogatories, depositions or discovery requests. In providing for mandatory disclosures the Commission believed, “reducing the burden of discovery may enhance the participation of ordinary citizens in the discovery process, since they often do not have the resources to engage in protracted litigation over discovery.”⁵⁸ The scope of the Commission’s general discovery regulation is clear:

A copy, or a description by category and location, of all documents and data compilations in the possession, custody, or control of the party that are relevant to the contentions, provided that if only a description is provided of a document or data compilation, a party shall have the right to request copies of that document and/or data compilation, and

(ii) A copy (for which there is no claim of privilege or protected status), or a description by category and location, of all tangible things (e.g., books, publications and treatises) in the possession, custody or control of the party that are relevant to the contention.

(iii) When any document, data compilation, or other tangible thing that must be disclosed is publicly available from another source, such as at the NRC Web site, <http://www.nrc.gov>, and/or the NRC Public Document Room, a sufficient disclosure would be the location, the title and a page reference to the relevant document, data compilation, or tangible thing.⁵⁹

⁵⁷ 69 Fed. Reg. 2,182, 2,194 (Jan. 14, 2004).

⁵⁸ Id.

⁵⁹ 10 C.F.R. § 2.336(a)(2)(i) (emphasis added).

“All documents” includes documents which provide support for, or opposition to, the proposed action that is the subject of the proceeding or are relevant to an admitted contention in that proceeding. The obligation of mandatory disclosure is continuing in nature and any information or documents that are subsequently developed or obtained must be disclosed.⁶⁰

VI. Powertech Motion for Reconsideration

One week after “consent[ing] to the Tribe’s request for borehole logs,”⁶¹ Powertech filed a Motion for Reconsideration on September 2, 2014.⁶² Powertech states, “[T]he primary focus of this Motion is how the requested data and information are “relevant” to Contention 3. Powertech asserts that the Licensing Board erred in its ruling that these data and information are relevant, as it overlooked existing Commission precedent regarding what may be challenged in this proceeding.”⁶³ Powertech contends “the proper scope of admitted contentions is whether the record of decision (ROD) was adequate to support an initial licensing action (i.e., issuance of NRC License No SUA-1600 to Powertech).”⁶⁴ By narrowing its definition of the scope of the proceeding to an examination of the data reviewed by the NRC

⁶⁰ 10 C.F.R. § 2.336(d).

⁶¹ Powertech (USA), Inc. Response to Oglala Sioux Tribe’s Motion for Mandatory Disclosures (Aug. 26, 2014) at 2.

⁶² Powertech (USA), Inc. Motion for Reconsideration of the Licensing Board’s August 20, 2014 Ruling on Relevancy for Mandatory Disclosures (Sept. 2, 2014).

⁶³ Id. at 3.

⁶⁴ Id. Powertech reasons, “. . . that NRC Staff determined that no further data were required for evaluation of fluid migration controls or subsurface features such as faults or fractures. Therefore, no other data are relevant to NRC Staff determining whether Powertech’s license application and ROD satisfied Commission regulations, which is the only relevant question in this proceeding.” Id. at 4.

Staff, Powertech, in effect, argues that once the NRC Staff issued a license to Powertech, no other data could be relevant to the admitted contentions to be heard at the evidentiary hearing.

Powertech's argument for reconsideration of the Board's ruling on the continuing obligation to make mandatory disclosure of data relevant to admitted contentions is without merit. Not only does Powertech's argument misapply selective passages from Commission precedent, its application would turn the administrative process on its head and nullify an evidentiary hearing on admitted contentions. In any event, the motion for reconsideration does not make the required showing of "compelling circumstances, such as the existence of a clear and material error in a decision, which could not have reasonably been anticipated, that renders the decision invalid."⁶⁵ Motions for reconsideration should be considered "only where manifest injustice would occur in the absence of reconsideration."⁶⁶ That is not the case here.

VII. Legal Questions to be Briefed

At the conclusion of the evidentiary hearing the NRC Staff requested the Board provide guidance as to the legal questions to be addressed in the post-hearing briefs.⁶⁷ The legal questions are as follows:

a. Contentions 1A and 1B: (1) What constitutes a reasonable and good faith effort to seek information from consulting parties, other members of the public, and Native American tribes to identify historic properties in the area of potential effect? (2) What constitutes "a reasonable opportunity to identify [a tribe's] concerns about historic properties, advise on the

⁶⁵ 10 C.F.R. § 2.323(e).

⁶⁶ Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,207 (January 14, 2004). These standards for reconsideration are to be strictly applied and such motions should not be granted lightly. Pac. Gas & Elec. Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-06-27, 64 NRC 399, 400-01 (2006).

⁶⁷ Tr. at 1327.

identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects?" 36 C.F.R. § 800.2(c)(2)(ii)(A). (3) Did the NRC Staff "recognize the government-to-government relationship between the Federal Government and Indian tribes" in the preparation of the FSEIS and the Programmatic Agreement (PA)? 36 C.F.R. § 800.2(c)(2)(ii)(C). (4) Have the federal courts held that a Level III cultural survey satisfies NEPA requirements as to places of religious or cultural significance (as opposed to NHPA § 106 requirements)?

b. Contention 2: (1) Have the federal courts addressed the 10 C.F.R. Part 40, Appendix A, Criterion 7 "baseline groundwater quality" and Criterion 5 "Commission-approved background" water quality distinction and ruled whether this staggered water quality review satisfies NEPA? (2) Further, in response to a question from Judge Barnett,⁶⁸ counsel for the Licensee and Staff stated that satisfying all the requirements of NUREG-1569 (e.g., staggered water quality review) will automatically satisfy all the relevant requirements of NEPA and 10 C.F.R. Part 40. Please provide legal support for this assertion, especially if the Commission or a federal court has so held.

c. Contention 3: (1) To what extent do the various studies in the record either support or undermine the proposition that the Fuson Shale will adequately contain fluid migration? (2) What is the appropriate legal standard to be applied in assessing the evidence regarding the suitability of the Fuson Shale to contain fluid migration?

d. Contention 4: (1) To what extent, if any, can the NRC rely upon analyses conducted by EPA or the State of South Dakota to fulfill its NEPA responsibilities? (2) Are the permitting processes of other agencies adequate to assess ground water quantity impacts?

⁶⁸ Tr. at 979, 984–85.

e. Contention 6: (1) Does NEPA require an analysis of mitigation measures? (2) Does NEPA require a showing of the effectiveness of proposed mitigation measures? (3) How detailed an analysis of proposed mitigation measures is required? (4) Are draft mitigation plans needed or to-be-drafted mitigation plans acceptable in the FSEIS?

f. Contention 9: (1) To what extent, if any, can the NRC rely upon analyses conducted by EPA or the State of South Dakota to fulfill its NEPA responsibilities? (2) Are the permitting processes of other agencies adequate to assess baseline, potential impacts, or proposed mitigation issues required to be addressed in a FSEIS? (3) Does NEPA require that the agency independently (a) identify and understand what the monitoring and mitigation measures will be, (b) assess and confirm that the mitigations will actually be implemented, and/or (c) assess and confirm that they will be effective? (4) In Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 352–53 (1989) the Court recognized that some of the environmental effects discussed in the FEIS “cannot be mitigated unless nonfederal government agencies take appropriate action,” but stated that “it would be incongruous to conclude that the [U.S.] Forest Service has no power to act until the local agencies have reached a final conclusion on what mitigating measures they consider necessary.” How does this decision and principle apply to this case?

VI. Post Hearing Briefs

The parties shall provide citations to the record (pre-filed testimony, cross-examination and exhibits) for the facts included in their proposed findings of fact. Similarly, proposed conclusions of law should contain citations to the cases, statutes and regulations that support the conclusions of law. If a party makes a factual assertion or suggests the Board make a factual finding, the party must provide citations to the record to support those evidentiary conclusions.

When citing to testimony, please give the name of the person who testified to a particular fact and a transcript page or an exhibit number and page in the case of the pre-filed direct

testimony. Avoid saying “the Staff testified” to this or referring to witnesses by their initials. Instead, for example, say Staff witness Yilma, Dr. Redmond, etc. testified to this or that. To the maximum extent possible, cite to the FSEIS, DSEIS, PA or the SER by their exhibit number and page in the record.

VII. Post Hearing Schedule

Upon issuance of this Order:	Powertech to disclose all bore-hole data, avian “take” application and BLM correspondence sought by the Oglala Sioux Tribe in its August 16, 2014 motion
September 19, 2014:	Proposed Transcript Corrections
September 26, 2014:	Objections to Proposed Transcript Corrections
Upon Disclosure:	Parties to submit Joint Notice of Disclosure to the Board indicating all bore-hole data, avian “take” application and BLM correspondence has been disclosed
Within 30 days of Disclosure:	Motions to Admit Additional Testimony/Exhibits together with testimony and exhibits based on newly disclosed data from examination of bore-hole data, avian “take” application and BLM correspondence
Within ten days thereafter:	Answers to motions to admit Additional Testimony/Exhibits and any responsive testimony and exhibits based on newly disclosed data from examination of bore-hole data, avian “take” application and BLM correspondence

The Board will then issue an order (1) establishing further procedures, if necessary,

(2) accepting proposed transcript corrections and (3) closing the evidentiary record.

30 Days thereafter: Post-Trial Initial Brief with Findings of Fact and Conclusions of Law

20 Days later: Post-Trial Reply Brief

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
September 8, 2014

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 **Post Hearing Order** 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

Post Hearing Order

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[Original signed by Clara Sola]
Office of the Secretary of the Commission

Rockville, Maryland
September 8, 2014