

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

Before Administrative Judges:

William J. Froehlich, Chair
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

November 13, 2014

ORDER

(Admitting New Exhibits and
Closing the Evidentiary Record on Contentions 1A, 1B, 2, 4, 6 and 9)

Background

On August 19, 20 and 21, 2014, the Board held an evidentiary hearing at the Hotel Alex Johnson in Rapid City, SD concerning seven contentions raised by the Oglala Sioux Tribe and the Consolidated Intervenors. By Order issued September 8, 2014, the parties were afforded an opportunity to file motions to admit additional testimony/exhibits based on information the Board ordered Powertech to disclose as part of its Mandatory Disclosure requirement.¹

The Board concluded that a “take” permit submitted to the U.S. Fish and Wildlife Service in January 2014 and avian plan documents were relevant to Contention 6 (Mitigation measures). The Board further concluded that BLM correspondence on the Licensee’s Plan of

¹ Post Hearing Order (Sept. 8, 2014) at 10–12 (unpublished).

Operations and responses thereto were relevant to Contentions 1A, 2, 3, 4, and 6.² Motions to admit additional testimony/exhibits based on these documents were due by October 14, 2014.³

On October 14, 2014, the NRC Staff filed a motion to admit additional testimony and exhibits addressing Powertech's newly disclosed materials, along with accompanying exhibits and testimony.⁴ The Oglala Sioux Tribe also filed a motion to admit additional exhibits.⁵ Powertech⁶ and the NRC Staff⁷ filed responses, and the Oglala Sioux Tribe sought leave under 10 C.F.R. § 2.323(c) to file a reply to these answers.⁸ The NRC Staff⁹ and Powertech¹⁰ opposed the motion for leave to file a reply. There is no right to file a reply, and the Board finds no section 2.323(c) compelling circumstances support the Oglala Sioux Tribe's request to file a reply. Therefore, the Board will not accept or consider the Oglala Sioux Tribe's reply. On

² Id. at 11–12.

³ Powertech was also ordered to disclose well-logs/bore-logs to the other parties, though the Oglala Sioux Tribe's deadline to file motions to admit additional testimony/exhibits based on this information was extended to November 21, 2014. Order (Granting in Part Motion to Extend Deadline) (Oct. 22, 2014) at 7 (unpublished).

⁴ NRC Staff's Motion to Admit Testimony and Exhibits Addressing Powertech's September 14, 2014 Disclosures (Oct. 14, 2014).

⁵ Oglala Sioux Tribe Motion to Admit Additional Exhibits (Oct. 14, 2014) [hereinafter OST Motion].

⁶ Powertech (USA), Inc. Response to Oglala Sioux Tribe and NRC Staff Supplemental Testimony and Exhibits (Oct. 24, 2014) [hereinafter Powertech Response].

⁷ NRC Staff's Response to Oglala Sioux Tribe's Motion to Admit Additional Exhibits (Oct. 24, 2014) [hereinafter Staff Response].

⁸ Motion for Leave to File a Reply to NRC Staff and Powertech Responses to Motion to Admit Additional Exhibits Filed on Behalf of the Oglala Sioux Tribe (Oct. 30, 2014); Reply to NRC Staff and Powertech Responses to Motion to Admit Additional Exhibits Filed on Behalf of the Oglala Sioux Tribe (Nov. 1, 2014).

⁹ NRC Staff's Response to Oglala Sioux Tribe's Motion for Leave to Submit Reply Brief (Nov. 4, 2014).

¹⁰ Powertech (USA), Inc. Response to Oglala Sioux Tribe Motion for Leave to Submit a Reply and Reply Brief (Nov. 7, 2014).

November 7, 2014 the Oglala Sioux Tribe submitted an unopposed motion to admit additional exhibits.¹¹

Oglala Sioux Tribe Exhibits

The Oglala Sioux Tribe's newly filed exhibits OST-022, OST-023 and OST-024 consist of the BLM letter, draft avian plan, and U.S. Fish and Wildlife Service "take" permit submission all disclosed by Powertech on September 12, 2014. The Board received no opposition to admitting these exhibits into evidence.¹² Having received no objection and finding this material to be relevant and material to the issues in this proceeding, the Board admits these exhibits.

The Oglala Sioux Tribe asked the Board how it can best file its bore hole log SUNSI exhibits, which are due by November 21, 2014. The Board directs the Oglala Sioux Tribe to submit, as it proposed, "selected relevant files . . . via the non-public submittal process as appropriate."¹³ These files, in pdf format, should be selected from the paper and electronic documents disclosed by Powertech, and referenced or referred to in accompanying witness testimony.

The Oglala Sioux Tribe also seeks to admit exhibits OST-025 and OST-026 which are two EPA documents involving the Dewey-Burdock project area:

(1) a September 2014 two-page announcement from U.S. EPA stating that it has completed a Preliminary Assessment (PA) of the Darrow/Freezeout/Triangle abandoned uranium mines located within the area of the proposed Dewey-Burdock project (Exh. OST-25); and (2) a September 24, 2014 document from Seagull Environmental Technologies captioned as "Preliminary Assessment Report regarding the Darrow/Freezeout/Triangle Uranium Mine Site near Edgemont, South Dakota, EPA ID: SDN000803095." (Exh. OST-26).¹⁴

¹¹ Oglala Sioux Tribe Unopposed Motion to Admit Additional Exhibits (Nov. 7, 2014).

¹² Staff Response at 1–2; Powertech Response at 2.

¹³ OST Motion at 3.

¹⁴ Id.

The Oglala Sioux Tribe argues that these documents are admissible as reliable, material, and relevant to Contentions 2, 3, 4 and 6.¹⁵ The Oglala Sioux Tribe asserts this is so because these documents support the allegation that inadequate data and analysis was used in the NEPA documents prepared by Powertech and the NRC Staff. The Oglala Sioux Tribe argues that these documents confirm data gaps and show the type of analysis that should have been conducted.¹⁶

The NRC Staff and Powertech oppose admission of OST-025 and OST-026. The NRC Staff argues that the EPA documents were prepared under the Comprehensive Environmental Response, Compensation, and Liability Act, and have no bearing on information needed in a NEPA analysis.¹⁷ Powertech opposes admitting the exhibits, claiming that they are not relevant or material.¹⁸ Powertech argues that the Oglala Sioux Tribe did not offer supplemental testimony explaining the relevance or materiality of these documents, and made no specific substantive arguments detailing the general assertions that the exhibits detail data gaps and insufficient analysis in the NEPA documents.¹⁹

The Board admits exhibits OST-025 and OST-026 into evidence for Contention 3. These exhibits satisfy 10 C.F.R. § 2.337(a) as “relevant, material, and reliable evidence” that may aid the Board in developing a complete record. The EPA documents contain groundwater sampling data submitted by Powertech for an area within the Dewey-Burdock project area.²⁰ This is relevant and material information to Contention 3. No parties have argued that these

¹⁵ Id.

¹⁶ Id.

¹⁷ Staff Response at 2.

¹⁸ Powertech Response at 3.

¹⁹ Id. at 3–4.

²⁰ OST-026 at 1, 6–12.

exhibits are not authentic EPA documents. The Board will give the information in these exhibits, like all evidence, its appropriate weight in the context or evaluation of the specific issues before us. In NRC-174 the NRC Staff has already taken the opportunity to submit testimony related to these exhibits. All parties will still have the opportunity to comment substantively on these exhibits in their post-trial briefs.

On November 7, 2014, the Oglala Sioux Tribe submitted another motion, which it represented as unopposed, to admit the additional exhibits OST-027 and OST-028.²¹ Finding these unopposed exhibits relevant and material to the issues in this proceeding, the Board admits these exhibits.

NRC Staff Exhibits

On October 14, 2014, the NRC Staff submitted a motion²² to admit new testimony and exhibits: NRC-158, NRC-165, NRC-004-R, NRC-170, NRC-157, NRC-159, NRC-164, NRC-171-R, NRC-167, NRC-003-R, NRC-160, NRC-161, NRC-005-R, NRC-163, NRC-162, NRC-174 and exhibits containing proprietary SUNSI, NRC-169, NRC-166, NRC-172, NRC-168 and NRC-173. No opposition to admitting the new NRC Staff testimony and exhibits into evidence has been received. Having received no objection and finding this material to be relevant and material to the issues in this proceeding, the Board admits these exhibits.

Powertech Exhibits

On October 24, 2014, Powertech moved to admit exhibits APP-072 and APP-073.²³ No opposition to admitting the new Powertech testimony and exhibits into evidence has been

²¹ Oglala Sioux Tribe Unopposed Motion to Admit Additional Exhibits (Nov. 7, 2014).

²² NRC Staff's Motion to Admit Testimony and Exhibits Addressing Powertech's September 14, 2014 Disclosures (Oct. 14, 2014); see also NRC Staff's Motion to Admit Exhibit NRC-171-R (Oct. 24, 2014); NRC Staff's Response to Oglala Sioux Tribe's Motion to Admit Additional Exhibits (Oct. 24, 2014).

²³ Powertech (USA), Inc. Response to Oglala Sioux Tribe and NRC Staff Supplemental Testimony and Exhibits (Oct. 24, 2014) at 3.

received. Having received no objection and finding this material to be relevant and material to the issues in this proceeding, the Board admits these exhibits.

Conclusion

The following exhibits are admitted into evidence in this proceeding: OST-022, OST-023, OST-024, OST-025, OST-026, OST-027, OST-028, NRC-003-R, NRC-004-R, NRC-005-R, NRC-157, NRC-158, NRC-159, NRC-160, NRC-161, NRC-162, NRC-163, NRC-164, NRC-165, NRC-167, NRC-170, NRC-171-R, NRC-174, APP-072 and APP-073. The following exhibits, containing SUNSI material, are also admitted: NRC-166, NRC-168, NRC-169, NRC-172, and NRC-173.

The record in this proceeding as it pertains to Contentions 1A, 1B, 2, 4, 6 and 9 is now closed. The record as it pertains to Contention 3 remains open pending receipt of an appropriate motion and additional bore-hole data testimony/exhibits addressing Powertech's September 14, 2014 disclosures. Such a motion and any additional testimony or exhibits²⁴ are

²⁴ SUNSI material must be filed in accordance with this proceeding's protective order. "The person filing the document must properly choose the option to prevent the document from being filed in the public docket. Only members of the Board, NRC Staff counsel, Applicant's counsel, and authorized persons should be "checked" as recipients on the electronic service list." Memorandum and Order (Protective Order Governing the Disclosure of Sensitive Unclassified Non-Safeguards Information (SUNSI)) (Mar. 5, 2010) at 3 (unpublished).

due no later than November 21, 2014.²⁵ Any responsive pleadings, testimony or exhibits are due by December 1, 2014.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

William J. Froehlich, Chair
ADMINISTRATIVE JUDGE

Rockville, Maryland
November 13, 2014

²⁵ Order (Granting in Part Motion to Extend Deadline) (Oct. 22, 2014) (unpublished).

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 (Admitting New Exhibits and Closing the Evidentiary Record on Contentions 1A, 1B, 2, 4, 6 and 9)** have been served upon the following persons by Electronic Information Exchange, and by electronic mail as indicated by an asterisk.

U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board (ASLB)
Mail Stop T-3F23
Washington, DC 20555-0001

William J. Froehlich, Chair
Administrative Judge
william.froehlich@nrc.gov

Richard F. Cole
Administrative Judge
richard.cole@nrc.gov

Mark O. Barnett
Administrative Judge
mark.barnett@nrc.gov

Anthony C. Eitrem, Esq., Chief Counsel
anthony.eitrem@nrc.gov

Nicholas Sciretta, Law Clerk
nicholas.sciretta@nrc.gov

U.S. Nuclear Regulatory Commission
Office of Commission Appellate Adjudication
Mail Stop O-16C1
Washington, DC 20555-0001
OCAA Mail Center
ocaamail@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Rulemakings & Adjudications Staff
Mail Stop O-16C1
Washington, DC 20555-0001
hearingdocket@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop O-15 D21
Washington, DC 20555-0001
Mary Spencer, Esq.
mary.spencer@nrc.gov
Michael Clark, Esq.
michael.clark@nrc.gov
Patricia Jehle, Esq.
patricia.jehle@nrc.gov
Sabrina Allen, Paralegal
sabrina.allen@nrc.gov
OGC Mail Center:
OGCMailCenter@nrc.gov

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

ORDER (Admitting New Exhibits and Closing the Evidentiary Record on Contentions 1A, 1B, 2, 4, 6 and 9)

Counsel for the Applicant (Powertech)
Thompson & Pugsley, PLLC
1225 19th Street, NW, Suite 300
Washington, DC 20036
Christopher S. Pugsley, Esq.
cpugsley@athompsonlaw.com
Cynthia L. Seaton, Paralegal
cseaton@athompsonlaw.com
Anthony J. Thompson, Esq.
ajthompson@athompsonlaw.com

Consultant to Applicant (Powertech)
WWC Engineering
1849 Terra Ave.
Sheridan, WY 82801
Jack Fritz
jfritz@wwcengineering.com

Counsel for the Oglala Sioux Tribe
Western Mining Action Project
P. O. Box 349
Lyons, CO 80540
Jeffrey C. Parsons, Esq.
wmap@igc.org

Counsel for the Oglala Sioux Tribe
Energy & Conservation Law
1911 Main Avenue, Suite 238
Durango, CO 81301
Travis E. Stills, Esq.
stills@frontier.net

Counsel for Consolidated Intervenors
Aligning for Responsible Mining (ARM)
David Frankel, Esq.*
P.O.B. 3014
Pine Ridge, SD 57770
arm.legal@gmail.com

Counsel for Consolidated Intervenors
(Susan Henderson and Dayton Hyde)
Law Office of Bruce Ellison
P.O. Box 2508
Rapid City, SD 57709
Bruce Ellison, Esq.*
belli4law@aol.com
Roxanne Andre, Paralegal*
roxanneandre@yahoo.com

Counsel for Consolidated Intervenor
(Dayton Hyde)
Thomas J. Ballanco, Esq.*
945 Traval Street, #186
San Francisco, CA 94116
harmonicengineering@gmail.com

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

Rockville, Maryland
November 13, 2014