

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

December 10, 2014

ORDER

(Admitting Additional Exhibits, Closing the Record on Contention 3 and Setting Briefing Dates)

Background

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 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 On November 13, 2014, the Board admitted additional exhibits and closed the record as it pertains to Contentions 1A, 1B, 2, 4, 6 and 9.² The record on Contention 3 was held open pending an extended filing deadline granted to the Oglala Sioux Tribe on the disclosed

¹ Post Hearing Order (Sept. 8, 2014) at 10–12 (unpublished).

² Order (Admitting New Exhibits and Closing the Evidentiary Record on Contentions 1A, 1B, 2, 4, 6 and 9) (Nov. 13, 2014) (unpublished).

borehole/electronic data logs.³ On November 21, 2014, the Oglala Sioux Tribe filed additional exhibits/testimony relevant to Contention 3.⁴ Powertech filed a response and additional exhibits/testimony on December 4, 2014,⁵ and the Staff filed its response and additional exhibits/testimony on December 9, 2014.⁶

Proposed Additional Exhibits

The Oglala Sioux Tribe seeks to admit exhibits OST-029, OST-030, OST-031, OST-032, OST-033, OST-034, OST-035, OST-036, OST-037, OST-038, OST-039, OST-040 and OST-041. The Oglala Sioux Tribe has filed these proposed exhibits as non-public documents, however the Oglala Sioux Tribe believes these proposed exhibits should be received as public exhibits and be placed in the public files associated with this case.⁷

Powertech seeks to admit exhibits APP-077 and APP-088. Powertech also seeks to admit as non-public exhibits APP-074, APP-075, APP-076, APP-078, APP-079, APP-080, APP-081, APP-082, APP-083, APP-084, APP-085, APP-086 and APP-087

The Staff seeks to admit exhibit NRC-175.

The Board received no opposition to admitting these exhibits into evidence.

Closing the Record and Setting Post-Hearing Briefing Schedule

³ Order (Granting in Part Motion to Extend Deadline) (Oct. 22, 2014) (unpublished).

⁴ Oglala Sioux Tribe Motion to Admit Additional Testimony and Exhibits (Nov. 21, 2014).

⁵ Powertech (USA), Inc. Response to the Oglala Sioux Tribe's November 21, 2014, Motion to Admit Additional Testimony and Exhibits (Dec. 4, 2014).

⁶ NRC Staff's Brief in Support of Answering Testimony (Dec. 9, 2014).

⁷ "The Tribe does not believe or concede that Dr. LaGarry's testimony, the borehole logs, or the driller's notes can qualify as confidential under federal laws applicable to these proceedings." Oglala Sioux Tribe Motion to Admit Additional Testimony and Exhibits (Nov. 21, 2014) at 2. Powertech opposed public filing of these exhibits, as "Powertech does not contest the admission of Dr. LaGarry's supplemental testimony and the proffered borehole log documents into evidence as confidential business information." Powertech (USA), Inc. Response to the Oglala Sioux Tribe's November 21, 2014, Motion to Admit Additional Testimony and Exhibits (Dec. 4, 2014) at 3.

The record in this proceeding as it pertains to Contention 3 is now closed.⁸ As the record is closed on all admitted contentions in this proceeding, the Board now sets the following post-hearing briefing schedule:

January 9, 2015	Parties to submit post-hearing Initial Brief with Findings of Fact and Conclusions of Law
January 29, 2015	Parties to submit post-hearing Reply Brief

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, 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.

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.⁹ The Board included these legal questions in the previously issued Post Hearing Order.¹⁰ For the parties’ convenience, the legal questions are repeated here:

⁸ Proposed transcript corrections were accepted by Board Order (Adopting Proposed Transcript Corrections) (Sept. 30, 2014) (unpublished).

⁹ Tr. at 1327.

¹⁰ Post Hearing Order (Sept. 8, 2014) at 16–18 (unpublished).

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 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,¹¹ 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?

¹¹ Tr. at 979, 984–85.

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?

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?

Conclusion

The following exhibits have been proposed as evidence in this proceeding: OST-029, OST-030, OST-031, OST-032, OST-033, OST-034, OST-035, OST-036, OST-037, OST-038, OST-039, OST-040, OST-041, APP-074, APP-075, APP-076, APP-077, APP-078, APP-079, APP-080, APP-081, APP-082, APP-083, APP-084, APP-085, APP-086, APP-087, APP-088 and NRC-175. Having received no objection from any of the parties and finding this material to be relevant and material to the issues in this proceeding, the Board admits these exhibits.

Exhibits APP-074, APP-075, APP-076, APP-078, APP-079, APP-080, APP-081, APP-082, APP-083, APP-084, APP-085, APP-086 and APP-087 are admitted as non-public exhibits.

Exhibits APP-077, APP-088 and NRC-175 are admitted as public exhibits.

Exhibits OST-029, OST-030, OST-031, OST-032, OST-033, OST-034, OST-035, OST-036, OST-037, OST-038, OST-039, OST-040 and OST-041 have been filed and are admitted as non-public exhibits. They will remain non-public exhibits until the Board rules whether or not they contain proprietary or confidential information.¹²

The parties are directed to file Memoranda of Law on whether any or all of the Oglala Sioux Tribe exhibits filed on November 21, 2014, and admitted into evidence, should be accorded non-public status. Said Memoranda of Law are due on or before December 19, 2014, and no replies will be reviewed by the Board.

The evidentiary record in this case on Contentions 1A, 1B, 2, 3, 4, 6 and 9 is now closed.

Parties have until January 9, 2015 to submit post-hearing Initial Briefs with Findings of Fact and Conclusions of Law. Post-hearing Reply Briefs are due January 29, 2015.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

William J. Froehlich, Chair
ADMINISTRATIVE JUDGE

Rockville, Maryland
December 10, 2014

¹² 10 C.F.R. § 2.390(b).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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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 Additional Exhibits, Closing the Record on Contention 3 and Setting Briefing Dates)** 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 (Admitting Additional Exhibits, Closing the Record on Contention 3 and Setting Briefing Dates)

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Rockville, Maryland
December 10, 2014