

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

Date: April 25, 2014

On February 25, 2009, Powertech submitted a license application for an Atomic Energy Act of 1954, as amended (hereinafter the “AEA”), combined source and 11e.(2) byproduct material license to construct and operate its proposed Dewey-Burdock ISR project in South

Dakota. After the Dewey-Burdock license application was made publicly available, on January 5, 2010, NRC Staff issued a Federal Register notice providing interested stakeholders and other members of the public with an opportunity to request a hearing on the application and to request access to sensitive unclassified non-safeguards information (SUNSI) associated with such application.¹ On March 8th and 9th, 2010, and April 6, 2010, CI and the Tribe respectively submitted requests for a hearing including proposed contentions for admission to such a hearing. On April 12 and May 3, 2010, Powertech and NRC Staff respectively submitted responses to CI's and the Tribe's requests and argued that most, if not all, of the proffered contentions were not admissible under NRC regulations at 10 CFR Part 2.309.

On August 5, 2010, the Licensing Board issued LBP-10-16 in which CI and the Tribe each were granted standing to intervene and several contentions for both parties were admitted. On November 26, 2012, NRC Staff issued the DSEIS for the proposed Dewey-Burdock project. By rule, CI and the Tribe were entitled to thirty days to file new or amended contentions. In compliance with this opportunity and after receiving an extension from December 31, 2012 to January 25, 2013, both CI and the Tribe filed requests to admit several new or amended contentions. On March 11, 2013, Powertech and NRC Staff filed responses to the CI and Tribe pleadings. On March 25, 2014, CI and the Tribe filed replies to these pleadings. Then, on July 22, 2013, the Licensing Board issued a decision admitting certain new or amended contentions for various reasons, including the migration tenet, and denying others. *See* LBP-13-09.

On March 20, 2013, NRC Staff issued its final Safety Evaluation Report (SER) for the proposed Dewey-Burdock ISR project (ML13052A182) and found that, "issuance of the license will not be inimical to the common defense and security or to the health and safety of the public." SER at 1. On January 29, 2014, the FSEIS was issued recommending that, absent a

¹ *See* 75 Fed. Reg. 467 (January 5, 2010).

safety-related issue to the contrary, Powertech's requested license should be issued. On April 8, 2014, NRC issued Powertech's requested license (NRC License No. SUA-1600) and the Record of Decision (ROD). On April 11, 2014, both NRC Staff and the Tribe filed their Motions. By this response, Powertech respectfully requests that the Licensing Board deny the Tribe's Motion for failure to satisfy NRC regulations for a grant of summary disposition on portions of Contentions 1A and 6 and grant NRC Staff's motion for summary disposition of the safety-related aspects of Contentions 2 and 3.

III. STATEMENT OF LAW

Under NRC regulations for this proceeding, parties are permitted to file summary disposition to address issues prior to the conduct of a Subpart L administrative hearing. Under 10 CFR § 2.1205(c), the Licensing Board may consider motions for summary disposition using criteria outlined in 10 CFR Part 2, Subpart G which states, "[t]he presiding officer need not consider a motion for summary disposition unless its resolution will serve to expedite the proceeding if the motion is granted." *See* 10 CFR § 2.710(d)(1). In motions for summary disposition, a moving party must make a showing that (1) there is "no genuine issue as to any material fact," and (2) "the moving party is entitled to a decision as a matter of law." *See e.g., Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), CLI-11-14, 74 NRC 801, 805-806 (2011). In a summary disposition motion, the moving party also must provide a "short and concise statement of material facts for which the moving party contends that there is no genuine issue to be heard." *See* 10 CFR § 2.1205(a). After a moving party submits its motion, the Licensing Board may summarily dispose of arguments within such motion if the opposing party cannot make a showing that there is a genuine issue of material fact. *See*

Advanced Medical Systems, Inc. (One Factor Row, Geneva, Ohio), CLI-93-22, 38 NRC 98, 102 (1993).

IV. ARGUMENT

As stated in Section I above, this Response is intended to address two (2) separate summary disposition motions. First, Powertech opposes the Tribe's summary disposition motion for Contentions 1A and 6 and argues that there are genuine issues of material fact with respect to its submission of facts. Second, Powertech supports NRC Staff's motion for summary disposition of the safety-related aspects of Contentions 2 and 3 and agrees that there is no genuine issue of material fact within the scope of their motion.

A. The Tribe's Motion for Summary Disposition of Contention 1A on Mitigation Measures Should Be Rejected for Failure to Show No Genuine Issue of Material Fact

In its Motion, the Tribe alleges that summary disposition should be granted on the mitigation measures portion of Contention 1A, because "NRC Staff compounded the NEPA violations by issuing the FSEIS and license² before the still-ongoing cultural analysis was prepared, without disclosing the mitigation measures in a NEPA document, without analyzing site-specific mitigation measures or their effectiveness in a NEPA analysis, and without circulating a NEPA analysis of mitigation measures for public comment." Tribe Brief at 9. The Tribe also alleges that there is no genuine issue of material fact "where the FSEIS confirms that NRC Staff decided to abandon representations and commitments made in these proceedings and segregate consideration of cultural resources issues from the NEPA process." *Id.* at 9-10. The Tribe supports its claims with its *Statement of Undisputed Material Facts* attached to its Brief.

² It is important to note that NRC Staff did not issue Powertech's NRC License or the ROD until after the Section 106 process was complete and the Programmatic Agreement (PA) was signed pursuant to the National Historic Preservation Act of 1966 (NHPA) and its implementing regulations in 36 CFR Part 800.

None of the Tribe's allegations demonstrate that no genuine issues of material fact exist. Indeed, if there is no dispute of material fact on this aspect of Contention 1A, then the Licensing Board should rule in favor of Powertech and NRC Staff.

With respect to potential procedural violations of the NHPA and NEPA by NRC Staff in completing the Section 106 process after issuance of the FSEIS, the Tribe mistakenly assumes that the NHPA and the Section 106 process are somehow a mandatory part of NRC's NEPA process. This assumption is incorrect as 36 CFR § 800.8 discusses the potential inclusion of the NHPA Section 106 process within the ambit of a lead agency's NEPA process (in this case, NRC's FSEIS). However, this regulatory provision does not mandate that the NHPA process be included in the NEPA process, nor does it indicate that it is within the statutory purview of NEPA, which is the reason that NRC could legally "de-couple" the Section 106 process for Dewey-Burdock from its 10 CFR Part 51 NEPA process. As such, the PA and associated Section 106 documentation were finalized after issuance of the FSEIS but, as required by NHPA regulations, prior to issuance of Powertech's NRC License and the ROD. While coupling of these NHPA and NEPA sometimes can be more efficient, it is not legally mandated.³ Since the Tribe's interpretation that there are legal requirements to combine NHPA and NEPA regulations in one environmental review document is totally without merit, this incorrect assumption cannot form the basis for summary disposition of this issue; but rather, this incorrect assumption can form the basis for summary disposition of this issue in favor of Powertech's NRC License, the PA, and NRC Staff's ROD. Thus, the Tribe cannot demonstrate that they have grounds for a decision as a matter of undisputed fact or law on this issue.

³ See *NEPA and NHPA, A Handbook for Integrating NEPA and Section 106* at 35 ("Under CEQ regulations, CEs, EAs, FONSI's and EIS's are not decision documents.") This statement demonstrate that no licensing decision was made by NRC Staff when the FSEIS was issued and, thus, the final licensing decision was not issued at that time.

With respect to mitigation measures for historic and cultural resources, the Tribe completely fails to acknowledge the primary mitigation measure offered in the ROD, which is the PA. The final PA document contains a wide range of “mitigation measures” for minimizing, avoiding or mitigating potential adverse effects. Indeed, NRC Staff’s analysis of historic and cultural resources yielded a finding of potential adverse effects and the PA as a 36 CFR § 800-compliant agreement document provided extensive measures for addressing these potential adverse effects. The fact that the PA was signed by the Advisory Council on Historic Preservation (ACHP), the expert agency for implementing the NHPA and promulgating implementing regulations, expressly demonstrating that ACHP endorsed NRC Staff conduct of the section 106 process and the PA’s mitigation measures satisfy NHPA requirements.

The Tribe’s cited case law does not given the methods by which NRC, as an independent regulatory agency, chooses to evaluate historic and cultural resources within or without its NEPA process nor the fact that “phased identification” under the NHPA is endorsed in 36 CFR § 800.4(b)(2) and by the Commission in two separate decisions in the *Hydro Resources, Inc.* litigation. *See e.g.*, CLI-06-11, 63 NRC 483 (April 3, 2006). Thus, the NRC License Conditions and Commitments in SUA-1600 and the PA executed by all mandatory signatories, including ACHP, are more than adequate to protect historic and cultural resources. Based on the above, Powertech disputes that there are no genuine issues of material fact with respect to the mitigation measures portions of Contention 1A as the Tribe’s statements about the adequacy of the development and the substance of mitigation measures are not only in dispute but are refuted by

the facts noted above. Accordingly, if the Licensing Board determines that summary disposition is warranted, then it should rule in favor of NRC Staff and Powertech.⁴

B. The Tribe's Motion for Summary Disposition of Contention 6 Should Be Rejected For Failure to Show No Genuine Issue of Material Fact

The Tribe's Motion also claims that all aspects of Contention 6, with the exception of air quality, should be summarily disposed of in this proceeding. The Tribe claims that there is no genuine dispute of material fact with respect to all resource areas except for air, because the "FSEIS includes vaguely identified potential mitigation measures, but does not analyze their effectiveness according to NEPA procedures." Tribe Brief at 13. The Tribe further claims that "as a matter of law, an FSEIS cannot rely on other agencies, later preparation of mitigation, and 'only a summary of proposed measures' to satisfy NEPA mandates." *Id.* at 14. These claims culminate in the Tribe's final request to invalidate the FSEIS and Powertech's NRC License, and to have the ROD remanded to NRC Staff for further consideration. *Id.* at 16. None of these claims demonstrate that there is no genuine dispute of material fact to warrant summary disposition.

First, the Tribe merely asserts that mitigation measures discussed in the FSEIS are "vague" and "conclusory" such as on Page 12 of their Brief. The use of these words to support summary disposition is contrary to the legal standard for such a motion. Powertech disputes the Tribe's claim that the FSEIS, as tiered off the ISR GEIS, discussion of mitigation measures for the NRC-licensed Dewey-Burdock ISR Project is "vague" or "conclusory." Indeed the Tribe's own statements that NRC Staff created a stand-alone Chapter 6 for mitigation measures entitled *Environmental Monitoring*, as well as discussion of such measures, where appropriate, in

⁴ The Tribe's *Statement of Undisputed Material Facts* lists several itemized facts that fit squarely within the scope of the allegations listed above, so Powertech will not list them here.

Chapter 4 is proof positive that there is a genuine dispute of material fact in this Contention. Further, there are extensive discussions of mitigation measures in Chapter 2 of the FSEIS on many resource areas including groundwater consumptive use and measures related to other forms of uranium including heap leaching. *See e.g.*, FSEIS at 2-64 & 2-65. Thus, Powertech disputes the Tribe's claims on this issue.⁵

Second, the Tribe's claims that NRC Staff cannot condition a license to allow for future, pre-operational development of mitigation measures is not correct. Powertech disputes the Tribe's claim on this and relies on the *Hydro Resources, Inc.* litigation where the Licensing Board and the Commission endorsed its policy of performance-based licensing with respect to development of groundwater quality standards post-license issuance. This licensing approach has been used by NRC Staff in each of the five (5) new ISR operating licenses issued after issuance of the ISR GEIS for a variety of resource areas, including those listed in Powertech's ROD. These requirements typically must be satisfied prior to commencement of operations and approved by NRC Staff in a pre-operational inspection and, to the extent necessary, with a license amendment. The Tribe fails to note that this licensing approach previously has been approved and, as such, there is a genuine dispute of material fact or grounds for a decision as a matter of law here, therefore, Powertech does not believe the Tribe's identified portions of Contention 6 can be supported with this claim.

Third, the Tribe claims that NRC Staff cannot rely on other agencies to address resource areas such as future permits. Powertech also disputes this claim because, as a standard license

⁵ *See also Hydro Resources, Inc.* (Crownpoint Uranium Project), CLI-06-29, 64 NRC 417, 427 (2006) (explaining that an EIS need not contain a "complete mitigation plan" or even "a detailed explanation of specific [mitigation] measures which will be employed" and stating that mitigation measures "need not be legally enforceable, funded or even in final form to comply with NEPA's procedural requirements").

condition, all NRC-licensed ISR operators are required to obtain all necessary licenses, permits, and approvals prior to commencement of operations. This license condition provides additional safeguards or mitigation measures for future licensed operations. Further, Powertech disputes that NRC Staff simply defers to other agencies. This claim is factually incorrect, because when NRC identifies other permits or other processes used by other agencies that comport with NRC Staff's statutory mission under the Atomic Energy Act of 1954, as amended, (AEA), NRC Staff simply concludes that those processes are acceptable under an NRC license. NRC is not permitted to allow a licensee to conduct AEA-licensed operations pursuant to permits or processes that do not adequately protect public health and safety. In the event that a State or federal agency issues a permit or authorizes a process that does not adequately protect public health and safety, NRC Staff is free to condition a license to prevent any potential adverse impacts. The Tribe cannot demonstrate that there is no genuine dispute of material fact on this issue or that they are entitled to a decision as a matter of law.⁶ Further, as stated above, Powertech also asserts that, if summary disposition is warranted for these portions of Contention 6, then the Licensing Board should rule in favor of NRC Staff and Powertech.

C. NRC Staff's Motion for Summary Disposition of the Safety-Related Aspects of Contentions 2 and 3 Should Be Granted

On April 11, 2014, NRC Staff submitted a motion for summary disposition requesting that the safety-related aspects of Contentions 2 and 3 be summarily disposed of in this proceeding. More specifically, with respect to the safety-related aspects of Contention 2, NRC Staff posits that they should be summarily dismissed due to the fact that Intervenor's pleadings

⁶ The Licensing Board also should discount this portion of the Tribe's argument, because it did not raise it in its pleadings on new/amended contentions on the DSEIS. *See Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), CLI-10-05, 71 NRC 90, 100-101 (finding that a contention's scope is limited to the issues of law and fact offered in the hearing request or intervention request).

allege that Powertech's license application omitted required information for determining pre-operational "baseline" groundwater quality conditions and analysis of "artesian and horizontal flow could impact surrounding aquifers and surface waters." *See* NRC Staff Motion at 9. NRC Staff concludes that the previously admitted Contentions D and 2, after being combined into Contention 2 were contentions of omission and that Powertech's responses to requests for additional information (RAI) from NRC Staff substantially addressed the alleged omissions, including additional information on pre-operational "baseline" groundwater quality, potential hydraulic connection in the Fall River groundwater zone, and surface and groundwater analytical results. *See* NRC Staff Motion at 10. Further, NRC Staff offers portions of its Safety Evaluation Report (SER), for the proposed Dewey-Burdock ISR project, which the Tribe did not challenge, to demonstrate that Powertech's RAI responses and subsequent NRC Staff analyses of data and information related to this Contention demonstrate that information alleged to have been omitted from Powertech's license application indeed has been supplied to and addressed by NRC Staff. *Id.* at 11.

Powertech concurs with NRC Staff's motion because, as shown in its Attachment 1, there can be no dispute that Powertech's RAI responses and NRC Staff's subsequent SER addressed the alleged omissions set forth by Intervenor in Contention 2. Powertech agrees that each of the RAI responses and other submissions offered in Attachment 1 accurately reflect the information offered by Powertech in its license application and its responses to NRC RAIs. Further, Powertech concurs that NRC Staff's SER addresses any remaining alleged omissions raised by the Intervenor in their hearing requests and admitted contentions and that Intervenor failed to timely amend their Contention. Thus, Powertech supports NRC Staff's request to summarily dispose of the safety-related aspects of Contention 2.

With respect to the safety-related aspects of Contention 3 or Intervenor's allegation that Powertech omitted necessary information on Dewey-Burdock site-specific hydrological confinement, NRC Staff states that this Contention, which is a combination of previously admitted Contentions E and 3, is also a contention of omission. NRC Staff supports these statements with references to Intervenor's pleading stating that Powertech omitted information regarding adequate confinement in the Dewey-Burdock recovery zone and potential faults and fractures in the Project area. NRC Staff Brief at 13. Further, NRC Staff cites to the Tribe's allegations that Powertech's license application did not include information on the Dewey-Burdock site's geological setting and potential effects on surface and groundwater resources. *Id.*

As cited by NRC Staff in its Brief, Powertech's RAI responses addressing its technical report provided supplementary information for its license application regarding each of these issues, including information regarding potential surface water impacts due to unplugged boreholes, potential impacts on hydrology from identified underground mine workings, potentially inadequate hydraulic containment during operations and from breccia pipes. *Id.* at 13. Indeed, Powertech's numerical groundwater model and its associated report addressed all such issues. NRC Staff Brief at 13. Most importantly, as stated by NRC Staff, the final SER's analyses on these issues based on Powertech's additional submissions, which address Intervenor's alleged omissions and, as noted above, Intervenor has failed to timely amend this Contention to dispute the additional data and analyses cited by NRC Staff. Thus, the Licensing Board should grant NRC Staff's motion for summary disposition of Contention 3.

V. CONCLUSION

For the reasons set forth above, Powertech respectfully requests that the Licensing Board reject both CI's and the Tribe's Motions for a stay of the effectiveness of Powertech's NRC License No. SUA-1600.

Respectfully submitted,

**/Signed (electronically) by/
Christopher S. Pugsley, Esq.**

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